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Orig. Number 16

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1928.

EX PARTE: IN THE MATTER OF THOMAS E. WILLIAMS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., PETITIONERS.

MOTION.

O. S. SPILLMAN, Attorney General of Nebraska.
GEORGE LEE BASYE, Assistant Attorney General of Nebraska.
HUGH LAMASTER, Assistant Attorney General of Nebraska,
Attorneys for Petitioners.

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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EX PARTE: IN THE MATTER OF THOMAS E. WILLIAMS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, AND

Pearl B. Woodworth, as County Treasurer of the County of Adams;
David C. Fletcher, as County Treasurer of the County of Antelope;
Mrs. Effiin Smith, as County Treasurer of the County of Blaine;
Cora M. Lewis, as County Treasurer of the County of Box Butte;
Jesse J. Shambaugh, as County Treasurer of the County of Buffalo;

George Ireland, as County Treasurer of the County of Burt;
Duane L. Sylvester, as County Treasurer of the County of Butler;
John L. Turner, as County Treasurer of the County of Cass;
Louis Ribe, as County Treasurer of the County of Cedar;
William F. Satchell, as County Treasurer of the County of Chase;
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Harry J. Platz, as County Treasurer of the County of Clay;
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Francis C. Cederholm, as County Treasurer of the County of Thayer;
Charles E. West, as County Treasurer of the County of Thomas;

Nettie Baker, as County Treasurer of the County of Thurston; Edmund M. Brown, as County Treasurer of the County of Valley; Mrs. Hazel Powell, as County Treasurer of the County of Webster; Thomas E. Wyman, as County Treasurer of the County of Wheeler; Homer Ramsey, as County Treasurer of the County of York,

PETITIONERS.

MOTION.

Come now the petitioners, above named, and move the court for leave to file their duly verified petition praying a writ of mandamus directed to Honorable Joseph W. Woodrough, Judge of the United States District Court, for the District of Nebraska, requiring him to call to his assistance two other federal judges as provided by United States Code, Title 28, Section 380 (Jud. Code, Sec. 266), to hear and determine, at the final hearing upon the merits, a certain cause now pending in the District Court of the United States for the District of Nebraska, Omaha Division, wherein the Chicago, Burlington & Quincy Railroad Company, a corporation, is plaintiff, and the petitioners herein are defendants; for the reason that said action is one to enjoin the enforcement and execution, by the officers of the state of Nebraska, of an order of the State Board of Equalization and Assessment of the State of Nebraska, an administrative board, acting under and pursuant to the statutes of the state of Nebraska, assessing the property of the Chicago Burlington & Quincy Railroad Company in Nebraska for taxation for the year 1923, upon the ground that such order is unconstitutional as in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States. A temporary injunction was prayed in said action and upon a hearing before said District Court, three judges sitting, as required by United States Code, Title 28, Section 380, a temporary injunction was granted, which temporary injunction has been ever

since the date of its entry and now is in full force and effect. Said cause is now ready for final hearing upon exceptions of these petitioners to the report of the special master therein and for final determination and the Honorable Joseph W. Woodrough, United States District Judge, aforesaid, has announced that he will not call to his assistance two other judges therefor, but that he will finally hear and determine said cause without the assistance of other judges and has set such final hearing for Monday, February 27, 1928, at 10 o'clock A. M. at the Federal Building, in the City of Omaha, Nebraska.

These petitioners present herewith a petition, duly verified, setting forth the facts upon which their claim is based and upon which they ask relief.

Respectfully submitted,

O. S. SPILLMAN,
Attorney General of Nebraska,

GEORGE LEE BATTE,
Assistant Attorney General,

HUGH LAMASTER,
Assistant Attorney General,
Attorneys for Petitioners.

Office Supreme Court, U. S.
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GEORGE LEE BASYE, Assistant Attorney General of Nebraska.
HUGH LAMASTER, Assistant Attorney General of Nebraska.
Attorneys for Petitioners.

PETITION.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the petitioners above named and respectfully allege:

I.

The petitioner Thomas E. Williams is the duly appointed, qualified and acting Tax Commissioner of the State of Nebraska and under the Constitution of the state has jurisdiction over the administration of the revenue laws thereof. The Governor of the State, Secretary of State, State Auditor, State Treasurer and Tax Commissioner constitute the State Board of Equalization and Assessment. The other petitioners are the respective county treasurers duly elected and qualified, of the several counties traversed by the lines of railway of the Chicago, Burlington & Quincy Railroad Company. They are legally and duly authorized officers of the State of Nebraska for the collection of its taxes and the taxes of the various municipal subdivisions thereof (except in some instances as to city and village taxes, which taxes are not involved in this controversy). The State Board of Equalization and Assessment assesses railroad property annually for the purpose of levying taxes thereon, said assessment is used as a basis for state, county, school district, road district and certain other taxes. Said board assesses railroads and some other forms of property and also equalizes as among county assessments of all other property and as among different classes of property. On the 15th day of June, 1923, the State Board of Equalization and Assessment assessed the value of the property of the Chicago, Burlington & Quincy Railroad Company in Nebraska for the purpose of state, county, school district and cer-

tain other taxes for the year 1923, at $137,589,782 and said assessment was duly apportioned and certified to the several county treasurers respectively of the counties traversed by the lines of said railroad company and thereafter taxes were levied by the state, county, school district and other authorities based upon said assessment which taxes became liens upon the property of said railroad company.

II.

On the 31st day of October, 1923, the Chicago, Burlington & Quincy Railroad Company filed its duly verified petition (Equity Docket Number 628) in the District Court of the United States for the District of Nebraska, Omaha Division, against the petitioners herein (or against their predecessors in office, some of these petitioners having become such officers since the filing of said petition, and have been substituted for the original defendants as hereinafter set forth) for the purpose of securing an injunction against the collection of more than sixty per cent. of the taxes levied under said order of the State Board of Equalization and Assessment on its property in Nebraska for the year 1923. The substance of such petition, material to this proceeding, briefly summarized, is as follows:

The plaintiff, the Chicago, Burlington & Quincy Railroad Company, is a corporation organized and existing under the laws of the State of Illinois, having its principal place of business in Chicago, in said state, and is a citizen and resident of the State of Illinois; the plaintiff is a common

carrier of freight and passengers by rail and operates lines of railway in several states including the State of Nebraska, and engages in interstate commerce; all of the defendants are residents and citizens of the State of Nebraska; it is a suit in equity of a civil nature invólving an amount against each defendant, exclusive of interest and costs, exceeding the sum of $3,000 and is a controversy wholly between the plaintiff, a citizen and resident of the State of Illinois, and the defendants, citizens and residents of the State of Nebraska; the claims and causes of action stated in the petition arise under and involve the construction and application of the Fifth and Fourteenth Amendments to the Constitution of the United States; it is alleged that the taxes levied against the plaintiff and its property based upon said order of the State Board of Equalization and Assessment are illegal because the property of the plaintiff was wrongfully and unlawfully valued and assessed and equalized for taxing purposes by the State Board of Equalization and Assessment in excess of its true and actual value to-wit: at 122 plus per cent. of its actual and true value while the property of all other taxpayers in the state, and particularly real estate, was intentionally and wrongfully assessed by the local taxing authorities at not to exceed 60 per cent. of its true and actual value, and which valuation came before the State Board of Equalization and Assessment and was wrongfully and unlawfully equalized by said Board at not to exceed 60 per cent. of its actual and true value, thereby resulting in a discrimination against the plaintiff and depriving it of the equal protection of the law in violation of the Constitution of the State of Nebraska and the statutes of said state and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and in violation of the

3rd subdivision of Section 4 of the Enabling Act of Congress passed April 19, 1864; it is also alleged that the action of the State Board of Equalization and Assessment in overassessing such railroad property and the action of the local assessing authorities in the several counties of Nebraska in underassessing other forms of property, and the action of the State Board of Equalization and Assessment in equalizing the assessment of the plaintiff's property with other property was wrongful and unlawful; that the property of the plaintiff was finally assessed and equalized at upwards of 122 per cent. of its value, whereas the property of all other taxpayers was finally assessed and equalized at not to exceed 60 per cent. of its actual and true value, and that the discrimination resulting therefrom was the result of a wilful, wrongful, continuous and systematic combination and conspiracy among the several taxing authorities of the State of Nebraska for the purpose of collecting from the plaintiff a larger percentage of taxes relatively to the amount of its property than should be collected from other taxpayers relatively to the amounts of their property; that the said unlawful combination and conspiracy had been carried on for a number of years prior to 1923 with similar results, thus causing the plaintiff to pay an excessive amount of taxes upon its property in the previous years and which would result, unless injunction should be granted, in causing it to pay an excessive amount of taxes upon its property in the year 1923; the object and purpose of the suit are to declare null and void the order of the State Board of Equalization and Assessment, assessing the property of the plaintiff in the year 1923, as being in violation of the Fifth and Fourteenth Amendments of the Federal Constitution and the action is brought to enjoin the enforcement and execution, by the State Tax Commissioner and the several county

treasurers, of said order by collecting the taxes levied thereunder; the prayer of the petition is for issuance and service of process upon the defendants; that the court enter an order prescribing the percentage of actual value of plaintiff's property and of the tax levied which plaintiff should tender as its tentative tax to the several county treasurers and for which they should issue their several receipts, not exceeding 60 per cent. of the actual value claimed for plaintiff's property; for a temporary restraining order enjoining and prohibiting the defendants from demanding, collecting or attempting to collect any taxes in excess of the portion that the court might fix and determine to be paid and from issuing distress warrants or commencing suit to collect any such excess or the interest thereon or any penalty for nonpayment thereof until the final hearing and judgment of the court; a temporary injunction was also prayed for the same purposes; a permanent injunction was prayed forever restraining and enjoining the defendants and their successors in office from collecting from the plaintiff or against its property taxes in excess of the just and fair amount based upon a valuation of plaintiff's property in due proportion to the valuation placed upon the property of other taxpayers as may be found and fixed by the order of the court; for a decree declaring null and void the valuation of plaintiff's property as fixed by the State Board of Equalization and Assessment as the same now appears upon the records of the defendants and discharging the plaintiff's property from the lien of said unlawful valuation and for general relief; plaintiff offered to pay 60 per cent of the taxes levied against its property with interest accruing on the first day of November, 1923; and stating that it was ready, willing and able to pay a greater percentage of taxes for state, county, school districts, township, road district and other like purposes, if the judgment of the

court should direct that a greater amount should be paid. City and village taxes are not involved. A complete copy of said petition is contained in the Appendix hereto at pages 17-77.

III.

On the first day of November, 1923, a chancery subpoena was duly issued by the clerk of said court directed to the several defendants named in the petition; being the petitioners herein or their predecessors in office. The same was duly served upon the respective defendants and due return made thereon. Immediately after the filing of said petition the plaintiff notified each of the defendants of the filing thereof and that the object and purpose thereof were to have declared invalid the 1923 assessment, by the State Board of Equalization and Assessment of Nebraska, of plaintiff's property within said state; and to have adjudged that all of said taxes in excess of 60 per cent. thereof as null and void; that on the twenty-first day of November, 1923, the hour and place being named, it would ask the court to issue a temporary injunction against the defendants to restrain them from collecting any part of said taxes in excess of 60 per cent. thereof. A complete copy (title omitted) of said notice is contained in the appendix hereto at pages 77-78.

IV.

On the 21st day of November, 1923, Honorable Joseph W. Woodrough, District Judge, called to his assistance, Honorable Robert E. Lewis, United States Circuit Judge, and Honorable Thomas C. Munger, United States District Judge in the hearing of the application for a temporary injunction; the plaintiff by its attorneys and the several defendants, by their attorneys appeared at the time and place specified in said notice and a hearing was had before

said court consisting of said three judges. At the conclusion thereof, the court entered the following order (title omitted):

"Now on this 21st day of November, 1923, this cause came on for hearing upon the application of plaintiff for a temporary injunction and it being brought to the attention of the court that the same legal questions involved in this case are already before the Supreme Court of the United States on appeal between the same parties in cases brought by the plaintiff in the year 1922 which appeal will be determined within the near future, and that the decision in that appealed case will probably be decisive of the issues in this case.

"*It is therefore by the court ordered* that upon the plaintiff paying to the defendants taxes levied in accordance with law to the extent of Seventy-five per cent (75%) of said levies and upon plaintiff filing a bond with the court in the sum of One Thousand and no/100 Dollars ($1000.00), that the defendants and each of them be and they hereby are restrained and enjoined from collecting or attempting to collect from the plaintiff taxes in excess of said percentage pending the further order of the court.

"It is further ordered that when it shall be brought to the notice of the court that said appealed cases have been decided by the Supreme Court of the United States then, upon reasonable notice, either party may call this case up for further hearing.

BY THE COURT:

Robt. E. Lewis,
United States Circuit Judge

Thos. C. Munger,
United States District Judge

J. W. Woodrough,
United States District Judge."

Said temporary injunction has been in full force and effect from the time of its entry to and including the present time and is still in full force and effect. Pursunt to said temporary injunction the plaintiff filed a bond as specified in said order which bond was duly approved and paid to the several county treasurers 75 per cent. of the taxes levied upon its property in the several counties based upon the assessment made by the State Board of Equalization and Assessment, hereinbefore referred to, and each of said defendant county treasurers received and accepted said 75 per cent and duly issued a receipt therefor. No other portion of said taxes has been paid by the plaintiff and the 25 per cent thereof which still remains unpaid is now the subject of this litigation.

V.

Thereafter, the defendants being the petitioners herein (except as the present officers have been substituted for former officers) filed their answer in which it is admitted that the plaintiff is a corporation; that it is a resident and citizen of the State of Illinois; that the defendants are the officers as named in the petition; that they are all residents and citizens of the State of Nebraska; that the suit involves a sum in excess of $3,000 as to each defendant, except six of the said county treasurers.

It denies that the property of the plaintiff was overvalued or overassessed by said Board of Equalization and Assessment in the year 1923; it admits that the property of other taxpayers was underassessed, but alleges that the property of the plaintiff was also underassessed to as great an extent.

It denies all charges of discrimination against the plaintiff; denies that there was any fraud, combination or conspiracy in the assessment or equalization of plaintiff's

property and alleges that plaintiff's property was fairly and honestly assessed and equalized and that said order of the State Board of Equalization and Assessment assessing the plaintiff's property for the year 1923, is in all respects just and valid. A dismissal of the suit is prayed.

A complete copy of the answer is contained in the appendix hereto at pages 78-102 (title omitted).

VI.

On the 13th day of June, 1925, the plaintiff applied to the court for the appointment of a Special Master, and on the 23rd day of June, 1925, the court, Honorable William S. Kenyon, Circuit Judge, Honorable Thomas C. Munger, District Judge and the Honorable Joseph W. Woodrough, District Judge, sitting, appointed B. H. Dunham, Esq., as Special Master to hear the evidence in said case and report the same, together with his conclusions of fact and his conclusions of law, to the court. A complete copy of the application of the plaintiff is contained in the appendix hereto, pages 102-103 hereof. A complete copy of the order appointing the Special Master is contained in the appendix hereto at pages 103-105.

VII.

By several orders of the court all of the defendants who have retired from office since the filing of the petition have been dismissed from the case and all of the new officers who have succeeded such retired officers have been made parties defendant. The defendants in the case are now those named as petitioners herein.

VIII.

Thereafter extensive hearings were held before the Special Master and on the 31st day of January, 1928, the

Special Master filed his report finding that the property of the plaintiff had been overassessed and that the property of other taxpayers had been underassessed and that wrongful and unlawful discrimination had been practiced against the plaintiff in the assessment and levy of taxes against its property for the year 1923 by the State Board of Equalization and Assessment, and recommending that a decree be entered restricting the payment to be made by the plaintiff for its 1923 taxes to the 75 per cent. as provided in the temporary order of injunction and that no further payment should be required of plaintiff for its taxes for the year 1923.

IX.

Within twenty days from the time of filing of said report the defendants, the petitioners herein, filed exceptions thereto. They specifically excepted to the findings by the Master that the property of the plaintiff had been overassessed in the year 1923; that the property of other taxpayers had been underassessed to so great an extent as to discriminate against the plaintiff and its property; that the plaintiff had been discriminated against in the assessment of its property; to the finding of value of the plaintiff's property which is of far larger value than the Master found; to the methods of the Master in finding the value of plaintiff's property; to the Master's methods of assigning values of plaintiff's railway system to plaintiff's property in the state of Nebraska; to the Master's disregard of the allegation of the plaintiff's petition and to the disregard by the Master of many portions of defendant's evidence.

Defendants insist that their exceptions, and all other matters involved in the final hearing, be heard by a court consisting of three judges as provided by Sec. 380, Title 28, United States Code.

X.

Thereafter, the defendants filed their motion asking the Honorable Joseph W. Woodrough to call to his assistance two additional Federal judges to sit with him at the final hearing of said cause and to assist him in the determination of the same, and on the 20th of February said motion was heard before the Honorable Joseph W. Woodrough, and the following order was entered:

"Now on this 20th day of February, 1928, this matter came on for hearing upon the motion of the defendants that the district judge sitting in the district court call to his assistance under Section 380, Title 28 of the U. S. Code a circuit and district judge or a justice of the supreme court, so that the exceptions of the parties to the master's report herein shall be heard and determined and this case finally determined in this court by a court of three judges, one of whom at least shall be a justice of the supreme court or a circuit judge; and, the court being well and fully advised in the premises, finds that the object and purpose of this action is to enjoin the collection of taxes against plaintiff's property by defendants county treasurers respectively of the counties wherein plaintiff's property is located in the state of Nebraska and there is no injunction issued, allowed or prayed for to restrain the action of any officer of the state of Nebraska and that the defendants county treasurers are not officers of the state of Nebraska within the meaning of Section 380 aforesaid and, therefore, the district court and the judge thereof refuses and declines to call to his assistance the additional judges as prayed for by the defendants.

"IT IS THEREFORE ORDERED, CONSIDERED AND ADJUDGED that defendants' motion be and the same is hereby overruled, to all of which the

defendants are allowed an exception. Done the day and year first above written.

BY THE COURT:

J. W. Woodrough
District Judge."

And at the time of entering said order Honorable J. W. Woodrough, Judge of said court, announced that the final hearing of said cause would be taken up by him on Monday, February 27, 1928, at the Federal Building in the City of Omaha, Nebraska.

By reason of all the facts herein stated the United States District Court, for the District of Nebraska is without jurisdiction to hear and determine said cause upon the final hearing without the presence of three judges as required by Section 380, Title 28 United States Code. These petitioners have no means of relief except by application for a writ of mandamus.

These petitioners pray that a writ of mandamus may issue out of this court directed to Honorable Joseph W. Woodrough, Judge of the United States District Court for the District of Nebraska, requiring him to call to his assistance two other Federal Judges as provided by said Section 380, Title 28, United States Code, to hear and determine said cause at the final hearing.

O. S. Spillman
Attorney General of Nebraska,

George Lee Basye
Assistant Attorney General of Nebraska,

Hugh LaMaster
Assistant Attorney General of Nebraska,
Attorneys for Petitioners.

DATED February 24, 1928.

STATE OF NEBRASKA }
}ss.
COUNTY OF LANCASTER }

Thomas E. Williams and William Albers being first duly sworn on oath depose and say that they are petitioners named above; that they have read the foregoing petition and know the contents thereof and that the matters and facts therein set forth are true.

Thomas E. Williams
State Tax Commissioner,

William Albers
Treasurer, Lancaster County.

Subscribed in my presence and sworn to before me this 24th day of February, 1928.

Frieda C. Beyerlein
Notary Public.

APPENDIX.

IN THE
DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEBRASKA
OMAHA DIVISION

In Equity No.....

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF,

V.

William H. Smith, as Tax Commissioner of the State of Nebraska;

And the treasurers of the respective counties in the State of Nebraska, to-wit:

Pearl Woodworth, as County Treasurer of the County of Adams;
David Fletcher, as County Treasurer of the County of Antelope.
Elmer N. DeMaray, as County Treasurer of the County of Blaine;
Cora M. Lewis, as County Treasurer of the County of Box Butte;
Gilbert E. Haase, as County Treasurer of the County of Buffalo;
Fred E. Erickson, as County Treasurer of the County of Burt;
William D. Miller, as County Treasurer of the County of Butler;
Mia Gering, as County Treasurer of the County of Cass;
Martin Nelson, as County Treasurer of the County of Cedar;
Mrs. Anna B. Grant, as County Treasurer of the County of Chase;
James M. Nelson, as County Treasurer of the County of Cheyenne;
Harry J. Platz, as County Treasurer of the County of Clay;
Joseph Sedlacek, as County Treasurer of the County of Colfax;
Edward L. Cleveland, as County Treasurer of the County of Custer;
Walter E. Miller, as County Treasurer of the County of Dakota;
Belle Quinn, as County Treasurer of the County of Dawes;
Irene Lamma, as County Treasurer of the County of Dawson.
Omar E. Butler, as County Treasurer of the County of Dixon.
Joseph Roberts, as County Treasurer of the County of Dodge;
Otto J. Bauman, as County Treasurer of the County of Douglas;
Freeman K. Fisk, as County Treasurer of the County of Dundy;
Clay Thomas, as County Treasurer of the County of Fillmore;
George A. Carter, as County Treasurer of the County of Franklin;
Geo. W. Wagner, as County Treasurer of the County of Frontier;
James H. Scott, as County Treasurer of the County of Furnas;
Julian A. Barnard, as County Treasurer of the County of Gage;

Frank M. Smith, as County Treasurer of the County of Garfield;
Martin E. Chambers, as County Treasurer of the County of Gosper;
John Haney, as County Treasurer of the County of Grant;
James L. Fitzpatrick, as County Treasurer of the County of Greeley;
Hugo H. Meves, as County Treasurer of the County of Hall;
Harry E. Toof, as County Treasurer of the County of Hamilton;
Jessie Middagh, as County Treasurer of the County of Harlan;
Thomas J. Birchall, as County Treasurer of the County of Hayes;
Robert R. Knowles, as County Treasurer of the County of Hitchcock;
William E. Conklin, as County Treasurer of the County of Holt;
John Kudrna, as County Treasurer of the County of Hooker;
John A. Frandsen, as County Treasurer of the County of Howard;
E. L. Jenkins, as County Treasurer of the County of Jefferson;
James A. Lawrence, as County Treasurer of the County of Johnson;
Jens H. Jensen, as County Treasurer of the County of Kearney;
Albert E. Sutherland, as County Treasurer of the County of Lancaster;
G. J. Taylor, as County Treasurer of the County of Lincoln;
Emil Hansen, as County Treasurer of the County of Merrick;
Hazel T. Scoggin, as County Treasurer of the County of Morrill;
Harry R. Young, as County Treasurer of the County of Nemaha;
Belle Galley, as County Treasurer of the County of Nuckolls;
David G. McAllister, as County Treasurer of the County of Otoe.
Mark Flanagin, as County Treasurer of the County of Pawnee;
Mary J. Ford, as County Treasurer of the County of Perkins;
Carl Peterson, as County Treasurer of the County of Phelps;
Alfred L. Brande, as County Treasurer of the County of Pierce;
William L. Boettcher, as County Treasurer of the County of Platte;
John W. Fillman, as County Treasurer of the County of Polk;
Naomi T. Wootton, as County Treasurer of the County of Red Willow;
Fred Brecht, as County Treasurer of the County of Richardson;
Vance Jelinek, as County Treasurer of the County of Saline;
D. S. Fase, as County Treasurer of the County of Sarpy;
George F. Bartek, as County Treasurer of the County of Saunders;
Peter B. Schmidt, as County Treasurer of the County of Scotts Bluff;
Agnes J. Pence, as County Treasurer of the County of Seward;
Clarence S. Marcy, as County Treasurer of the County of Sheridan;
Frank A. Grow, as County Treasurer of the County of Sherman;
Edward B. Lyon, as County Treasurer of the County of Sioux;
Francis Cederholm, as County Treasurer of the County of Thayer;
Chas. E. West, as County Treasurer of the County of Thomas;
Nettie Baker, as County Treasurer of the County of Thurston;
Lafe Paist, as County Treasurer of the County of Valley;
Mrs. Hazel Powell, as County Treasurer of the County of Webster;
T. Edward Wyman, as County Treasurer of the County of Wheeler;
Frank L. Propst, as County Treasurer of the County of York;
and their several successors in office,

DEFENDANTS.

PETITION IN EQUITY.

To the Honorable, the Judges of the District Court of the United States, in and for the District of Nebraska:

Comes now the plaintiff, and for cause of action alleges:

I.

Plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of Illinois, having its principal office and place of business in the City of Chicago, in Cook County, in said state, and is and was during all the times hereinafter referred to a citizen and a resident of the State of Illinois, and a non-resident of the State of Nebraska. Plaintiff was organized for the purpose of transacting the business of a common carrier of passengers and freight by rail in the States of Illinois, Iowa, Nebraska, and other states, and that it owns and operates as such carrier lines of railroad in the States of Illinois, Iowa, Wisconsin, Minnesota, Missouri, Kansas, Nebraska, Colorado, South Dakota, Wyoming and Montana, and in all these states is and during all the times in the petition referred to was engaged in interstate commerce.

II.

That the defendant, William H. Smith, is the duly appointed, qualified and acting Tax Commissioner of the State of Nebraska, and is and has been during all the year A. D. 1923, a citizen and resident of said state, and that of the counties hereinafter named in the State of Nebraska, in which this petitioner operates, and of which your petitioner complains:

Pearl Woodworth is the duly qualified and acting county treasurer of the County of Adams, and is and has been during all the year A. D. 1923, a citizen and resident of the State of Nebraska.

David Fletcher is the duly qualified and acting county treasurer of the County of Antelope, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Elmer N. Demaray is the duly qualified and acting county treasurer of the County of Blaine, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Cora M. Lewis is the duly qualified and acting county treasurer of the County of Box Butte, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Gilbert E. Haase is the duly qualified and acting county treasurer of the County of Buffalo, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Fred E. Ericson is the duly qualified and acting county treasurer of the County of Burt, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

William D. Miller is the duly qualified and acting county treasurer of the County of Butler, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Mia Gering is the duly qualified and acting county treasurer of the County of Cedar, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Martin Nelson is the duly qualified and acting county treasurer of the County of Cedar, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Mrs. Anna B. Grant is the duly qualified and acting county treasurer of the County of Chase, and is and

has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

James M. Nelson is the duly qualified and acting county treasurer of the County of Cheyenne, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Harry J. Platz is the duly qualified and acting county treasurer of the County of Clay, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Joseph Sedlacek is the duly qualified and acting county treasurer of the County of Colfax, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Edward L. Cleveland is the duly qualified and acting county treasurer of the County of Custer, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Walter E. Miller is the duly qualified and acting county treasurer of the County of Dakota, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Belle Quinn is the duly qualified and acting county treasurer of the County of Dawes, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Irene Lamma is the duly qualified and acting county treasurer of the County of Dawson, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Omar E. Butler is the duly qualified and acting county treasurer of the County of Dixon, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Joseph Roberts is the duly qualified and acting county treasurer of the County of Dodge, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Otto J. Bauman is the duly qualified and acting county treasurer of the County of Douglas, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Freeman K. Fisk is the duly qualified and acting county treasurer of the County of Dundy, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Clay Thomas is the duly qualified and acting county treasurer of the County of Fillmore, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

George A. Carter is the duly qualified and acting county treasurer of the County of Franklin, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

George W. Wagner is the duly qualified and acting county treasurer of the County of Frontier, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

James H. Scott is the duly qualified and acting county treasurer of the County of Furnas, and is and has been

during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Julian A. Barnard is the duly qualified and acting county treasurer of the County of Gage, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Frank M. Smith is the duly qualified and acting county treasurer of the County of Garfield, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Martin E. Chambers is the duly qualified and acting county treasurer of the County of Gosper, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

John Haney is the duly qualified and acting county treasurer of the County of Grant, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

James L. Fitzpatrick is the duly qualified and acting county treasurer of the County of Greeley, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Hugo H. Beves is the duly qualified and acting county treasurer of the County of Hall, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Harry E. Toof is the duly qualified and acting county treasurer of the County of Hamilton, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Jessie Middagh is the duly qualified and acting county treasurer of the County of Harlan, and is and has been

during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Thomas J. Birchall is the duly qualified and acting county treasurer of the County of Hayes, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Robert R. Knowles is the duly qualified and acting county treasurer of the County of Hitchcock, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

William E. Conklin is the duly qualified and acting county treasurer of the County of Holt, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

John Kudrna is the duly qualified and acting county treasurer of the County of Hooker, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

John A. Frandsen is the duly qualified and acting county treasurer of the County of Howard, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

E. L. Jenkins is the duly qualified and acting county treasurer of the County of Jefferson, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

James A. Lawrence is the duly qualified and acting county treasurer of the County of Johnson, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Jens H. Jensen is the duly qualified and acting county treasurer of the County of Kearney, and is and has been

during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Albert E. Sutherland is the duly qualified and acting county treasurer of the County of Lancaster, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

G. J. Taylor is the duly qualified and acting county treasurer of the County of Lincoln, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Emil Hansen is the duly qualified and acting county treasurer of the County of Merrick, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Hazel T. Scoggin is the duly qualified and acting county treasurer of the County of Morrill, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Harry R. Young is the duly qualified and acting county treasurer of the County of Nemaha, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Belle Galley is the duly qualified and acting county treasurer of the County of Nuckolls, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

David G. McAllister is the duly qualified and acting county treasurer of the County of Otoe, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Mark Flanagin is the duly qualified and acting county treasurer of the County of Pawnee, and is and has been

during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Mary J. Ford is the duly qualified and acting county treasurer of the County of Perkins, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Carl Peterson is the duly qualified and acting county treasurer of the County of Phelps, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Alfred L. Brande is the duly qualified and acting county treasurer of the County of Pierce, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

William L. Boettcher is the duly qualified and acting county treasurer of the County of Platte, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

John W. Fillman is the duly qualified and acting county treasurer of the County of Polk, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Naomi T. Wootton is the duly qualified and acting county treasurer of the County of Red Willow, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Fred Brecht is the duly qualified and acting county treasurer of the County of Richardson, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Vance Jelinek is the duly qualified and acting county treasurer of the County of Saline, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

D. S. Fase is the duly qualified and acting county treasurer of the County of Sarpy, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

George F. Bartek is the duly qualified and acting county treasurer of the County of Saunders, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Peter B. Schmidt is the duly qualified and acting county treasurer of the County of Scotts Bluff, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Agnes J. Pence is the duly qualified and acting county treasurer of the County of Seward, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Clarence S. Marcy is the duly qualified and acting county treasurer of the County of Sheridan, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Frank A. Grow is the duly qualified and acting county treasurer of the County of Sherman, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Edward B. Lyon is the duly qualified and acting county treasurer of the County of Sioux, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Francis Cederholm is the duly qualified and acting county treasurer of the County of Thayer, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Charles E. West is the duly qualified and acting county treasurer of the County of Thomas, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Nettie Baker is the duly qualified and acting county treasurer of the County of Thurston, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Lafe Puist is the duly qualified and acting county treasurer of the County of Valley, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Mrs. Hazel Powell is the duly qualified and acting county treasurer of the County of Webster, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

T. Edward Wyman is the duly qualified and acting county treasurer of the County of Wheeler, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

Frank L. Propst is the duly qualified and acting county treasurer of the County of York, and is and has been during all the year A. D. 1923 a citizen and resident of the State of Nebraska.

III.

This is a suit of a civil nature in equity involving an amount against each of the defendants jointly and sev-

erally exclusive of interest and costs exceeding the sum or value of Three Thousand Dollars ($3,000.00), and is a controversy wholly between the plaintiff, a citizen and resident of the State of Illinois and a non-resident of the State of Nebraska, and the defendants, all and singular of whom are citizens and residents of the State of Nebraska and non-residents of the State of Illinois.

IV.

That the claims and causes of actions stated in this suit arise under and involve the construction and application of the Fifth and Fourteenth Amendments to the Constitution of the United States, providing, amongst other things, that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation and that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and plaintiff claims protection of said Amendments to the Constitution of the United States, against the unlawful acts of the defendants hereinafter set forth.

V.

Plaintiff further alleges that this is a suit in equity to enjoin the collection of illegal taxes levied against plaintiff and its property; these taxes are illegal because the property of plaintiff has been valued for taxing purposes at more *than its true value, to-wit, 122%+*, while the property of all other tax payers in the state, and particularly real estate, has been systematically, intentionally and continuously valued at not to exceed 60%

of its true value, thereby resulting in a discrimination against the plaintiff, and depriving it of the equal protection of the law, in violation of Sections 1 and 4 of Article VIII of the Constitution of the State of Nebraska, and the statutes of said state, and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and of the Third Subdivision of Section 4 of the Enabling Act of Congress passed April 19, 1864, by the Congress of the United States, to enable the people of Nebraska to form a constitution and state government, and for the admission of said state into the Union on an equal footing with the original states.

VI.

Plaintiff further alleges that on the 19th day of April, 1864, the Congress of the United States passed an act to enable the people of Nebraska to form a constitution and state government and for the admission of such state into the Union on an equal footing with the original state (p. 47, Vol. 13 U. S. Sta. at Large) (Compiled Statutes, 1922, page 29). In the Third Subdivision of Section Four of this Act it was provided, amongst other things, that the Constitution of said State should provide by an article forever irrevocable without the consent of the Congress of the United States that the people inhabiting said territory do agree and declare:

> "that the lands belonging to citizens of the United States residing without the said State, shall never be taxed higher than the land belonging to residents thereof."

The people of the then territory of the State of Nebraska, duly assembled, did prepare and adopt a constitution, and submitted the same to the electors of said territory to be adopted or rejected. The said con-

stitution was duly adopted by the electors of said State, and was approved by the Governor of the territory of Nebraska, February 9, 1866, and is known as the Constitution of the State of Nebraska of 1866. Amongst other things it was provided in Article XI of said Constitution in Section 6 thereof, that:

> "This constitution is formed, and the State of Nebraska asks to be admitted into the Union on an equal footing with the original states, on the condition and faith of the terms of the propositions stated and specified in an act of Congress, approved April 19, 1864, authorizing the people of the territory to form a constitution and state government; the people of the State of Nebraska hereby accepting the conditions in said act specified."

Whereby the provisions and conditions of the Enabling Act of Congress above referred to, became part of the organic law of the State of Nebraska irrevocable excepting by the consent of the Congress of the United States.

Two constitutions were subsequently adopted by the people of the State of Nebraska; one in 1875, and the one now in effect, in 1919. But plaintiff alleges that the Congress of the United States has not consented that the lands belonging to citizens of the United States residing without said State shall be taxed higher than the land belonging to residents of the State of Nebraska, and plaintiff further invokes the protection of the provisions of the Enabling Act referred to as adopted and ratified by the electors of the State of Nebraska, evidenced in the Constitution of 1866, page 51, Gen. Stat. of Neb. 1873.

Plaintiff further alleges that including branches and spurs, there are 6,457.9 miles of railway owned and operated by various railroad corporations in the State

of Nebraska, of which but 798.12 are owned by corporations, citizens and residents of the State of Nebraska; that of such mileage plaintiff owns and operates 2,861.6 miles, and the 5,659.78 miles remaining, after deducting the mileage owned by residents of the State of Nebraska, are all owned and operated by non-residents of the State of Nebraska, citizens and residents of the states other than of Nebraska, citizens and residents of states other than the State of Nebraska. That a great part of the property operated within the State of Nebraska, consists of real estate and its appurtenances.

VII.

Plaintiff further alleges that references in this petition to the Constitution of the State of Nebraska, other than the Constitution of 1866, and all references to the statutes of Nebraska unless otherwise stated are to the sections and pages of the Compiled Statutes of Nebraska for 1922. Amongst other relevant provisions of the Constitution and the statutes of the State are:

Section 1 of Article VIII of the Constitution of Nebraska, page 89:

> "The necessary revenue of the State and its governmental subdivisions shall be raised by taxation in such manner as the legislature may direct; *but taxes shall be levied by valuation uniformly and proportionately* upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the legislature."

It is further provided by Section 4 of Article VIII of the Constitution of Nebraska, page 91:

> "The legislature shall have no power to release or discharge any county, city, township, town or dis-

trict whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its *proportionate share of taxes* to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

It is provided by Section 28 of Article IV of the Constitution of Nebraska, page 74:

"A Tax Commissioner shall be appointed by the Governor with the advice and consent of the Senate. He shall have jurisdiction over the administration of the revenue laws of the state, and together with the Governor, Secretary of State, State Auditor and State Treasurer shall have power to review and equalize assessments of property for taxation within the state. He shall have such other power and perform such other duties as the Legislature may provide. His term of office and compensation shall be as provided by law."

It is provided in Section 5820, page 1827, that:

"All property in this state, not expressly exempt therefrom shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value' as used in this Act, shall mean its value in the market in the ordinary course of trade."

Section 5821 exempts from taxation property of the state and its governmental subdivisions, property owned by and used exclusively for agricultural and horticultural societies, owned and used exclusively for educational, religious, charitable or cemetery purposes, if not owned or used for financial gain or profit, household goods of the value of $200 to each family, and increased value of land by reason of shade and ornamental trees planted along the highway.

Section 5822 provides:

"Taxes on all real property shall be a first lien thereon from and including the first day of December of the year in which they are levied until the same are paid, except general city taxes on real property within the corporate limits of cities of the metropolitan class, which shall be a first lien thereon from and including the first day of May following the levy, until the same are paid."

Section 5823:

"Taxes assessed upon personal property shall be a first lien upon the personal property of the person to whom assessed from and after the first day of November of the year in which they are assessed, until paid."

Section 5825:

"All general taxes due the state and its governmental subdivisions shall be a first lien on the real estate on which levied, and take priority over all other encumbrances and liens thereon."

Section 5827:

"The Tax Commissioner shall be appointed by the Governor with the advice and consent of the Senate and shall receive Five Thousand Dollars per annum, and have jurisdiction over the administration of this Act and all the revenue laws of the state; subject to review by the State Board of Equalization and Assessment, and together with the Governor, Secretary of State, State Auditor and State Treasurer, shall have power to review and equalize assessments of property for taxation within the state, and said officers collectively shall constitute and be known as the State Board of Equalization and Assessment."

Section 5829:

"The form of all blanks, forms, schedules, books of instruction, assessment and tax books, records, and all other forms which may be necessary or expedient for the proper administration of this act, or of the revenue laws in general shall, on or before the fifteenth day of January of each year be approved by the tax commissioner, and all such schedules, forms and documents shall be uniform throughout the several counties in so far as the same is possible and practicable. The tax commissioner shall, on or before the first day of January of each year furnish the county clerk of each county forms for all schedules for the listing and assessment of personal property; and the county clerk of each county shall, on or before the first day of April in each year cause to be printed a sufficient number of such schedules for the use of the county and deliver the same to the county assessor."

Section 5830:

"Whenever it shall be made to appear to the Tax Commissioner that any property has been improperly omitted from the tax list or assessment roll of any district or county for any year; or, if assessed, that the same has been undervalued, as compared with like property in the same county or in the state, so that the assessment for such year in such district or county is grossly unfair or inequitable, whether the same has been equalized by the county Board of Equalization or the State Board of Equalization and Assessment or not, he shall report the same to the State Board of Equalization and Assessment, and said Board shall examine into the facts, and shall cause to be served upon any person, company or corporation affected by such reassessment, an order to show cause why such reassessment should not be made; which order to show cause shall be served for a period of at least ten days prior to the date

fixed for such hearing; and at such hearing if satisfied that it would be for the best interest of the state that a reassessment of such property be made, said board may appoint a Special Assessor and such deputy assessors as may be necessary to cause a reassessment to be made of all or any real and personal property, or either, in any such district or county as to them may seem proper, to the end that all property in such district or county shall be assessed equitably as compared with like property in such district, county or state. Provided, however, that no such action shall be taken by the Tax Commissioner, or others under the provisions hereof, unless the same be commenced by December first, next following the date of the original assessment. Provided, further, however, that no land shall be re-assessed under the provision of this section where the same shall have changed ownership otherwise than by will, inheritance or gift. Provided, further, that where an appeal has been taken from the original assessment and an adjudication thereof had by the court, such adjudication shall be final and not subject to modification by re-assessment."

Sections 5839 and 5840 provide:

"The State Board of Equalization and Assessment is hereby empowered, and it is made its duty, to assess all property of the railroads and railroad corporations in the State of Nebraska. Provided, however, that all machine repair shops, general office buildings, store houses, and also all real and personal property outside of right of way and depot grounds, as of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation by the principal officers or agents of such companies with the assessors of any precinct of the county where such real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property."

"The Board on the first Monday of May of each year shall proceed to ascertain all property of any railroad company owning, operating or controlling any railroad or railroad service in this state, which for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, roadbed, right of way and depot grounds, and all water and fuel stations, buildings and super-structures thereon, and all machinery, rolling stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with franchises and all other property of such railroad company used or held for the purpose of operating its road, and appraise and assess the same as personal property as herein provided."

Complainant further alleges that Sections 5841, 5842 and 5843 provide:

Sec. 5841: "On or before the fifteenth day of April, in each year, the person, company, or corporation owning, operating or controlling any railroad or railroad service in this state, shall, by its president secretary or principal accounting officer, return to the state board of equalization and assessment a sworn statement or schedule of the property of such company on the thirty-first day of March preceding."

And then prescribes specifically the facts which shall be set forth in said report:

Sec. 5842: "The returns of railroad companies or corporations shall not be held to be conclusive as to the value of the property, but the state board of equalization and assessment shall, from all the information which it is able to obtain, including record of the railway commission or other regulatory body, find the true value of all such property, including tangible property and franchises, and shall assess

the same on the same basis as other property as hereby required to be assessed. The valuation of each mile shall be determined by dividing the whole value by the number of miles of the main track of each road or line."

Section 5843 provides a penalty for the failure of any company to make the return required by Section 5841.

Complainant further alleges that Section 5844 to 5850, provide:

"Any railroad company operating any road within the State of Nebraska shall annually, on or before the first day of April, report to the County Clerk of each county through which its line of road runs the number of miles of main track situated within each governmental subdivision in the county, together with all machine and repair shops, general office buildings, store houses, and all real and personal property not on the right of way.

"The State Board of Equalization and Assessment shall have power to require the attendance before it of any officer, agent or servant of any railroad or railway company having any portion of its property in this state, to answer under oath such questions touching said property as may be propounded by the Board. The Board shall have power to issue whatever notice or process may be necessary to compel the attendance of any such person as a witness, which process may be served by any person deputed by the Board for that purpose. Any person who shall fail to respond to such process, or who shall refuse to answer any proper question put to him by the Board shall forfeit the sum of five hundred dollars, to be recovered in a civil action prosecuted in the name of the state.

"Any officer, agent or servant of any railroad company, or other person, who shall knowingly make any false answer to any question put to him by such Board, or in its behalf, touching the property, business, money

and credits, or value thereof, of such company, shall be guilty of perjury.

"The State Board of Equalization and Assessment, after having valued and assessed all the railroad property in this state in accordance with the provisions of this article, shall immediately make return to the County Clerk of each and every county in which any portion of the railroad property as designated in this article may be located, to be used as the basis of levy for the county and governmental subdivisions through which any railroad or part thereof may extend.

"Such return shall include the following:

"(1) Number of miles of track of each railroad located in each governmental subdivision in the county, and the total length of such road in the county;

"(2) The average valuation per mile of such road;

"(3) The valuations that shall be placed to the credit of such governmental subdivision in the county.

"The State Board shall transmit to each county, as soon as practicable after receiving returns from the railroad company, a statement from such returns showing as to each county and railroad all machines and repair shops, general office buildings, store houses, and also all real and personal property outside of such railroad right of way, and depot grounds, not included in the property herein required to be assessed by the State Board of Equalization and Assessment, and in what governmental subdivision located, which return shall be for the benefit of the county board and local assessors.

"Railroad property assessed by the State Board shall be apportioned by the County Clerk among the respective governmental subdivisions in which the same may be entered on the tax list and collected by the County Treasurer."

Plaintiff further alleges that Sections 5901, 5904 and 5905 provide:

"The State Board of Equalization and Assessment shall, on the first Monday of July of each year, meet at the state capitol for the purpose of equalizing assessments. They shall proceed to examine the abstracts of property assessed for taxation in the several counties of the state, including the railroads entirely within such county, and all other property, and shall equalize such assessments so as to make the same conform to law, and for that purpose they shall have the power to increase or decrease the assessed valuation of any county or tax district, and such increase or decrease shall be made by a percentum, and the per cent of increase or decrease when made shall be certified to the county clerk of the proper county, who shall thereupon add to or deduct from the assessment of each piece or parcel of property in the county affected an amount equal to the percent of increase or decrease fixed by the state board. The state board shall have the power, in equalizing assessments, to increase or decrease the assessed valuation of any class, classes or kinds of property in any county or tax district, whenever in their judgment it shall be necessary to make such assessment conform to law; and such increase or decrease, when made, shall be certified to the county clerk and by the county clerk extended upon the tax rolls as hereinbefore provided; but in the extension of valuations the county clerk shall reject all such amounts as may fall below two dollars and fifty cents, and all amounts of two dollars and fifty cents or more shall be extended as the next high five dollars or multiple thereof, this making all valuations end in cipher or five. In the event it shall appear to the state board of equalization and assessment that a just, equitable and legal assessment of the property in the state cannot be made without increasing or decreasing the valuation as returned by any county, the board of equalization and assessment shall issue

a notice to the counties which the board deems either under-valued or over-valued and shall set a date for hearing at least five days following the mailing of such notice. At such hearing legal representatives of the counties may appear and show cause why the valuation or valuations of their county should not be increased or decreased by the state board, and after a full hearing, the state board shall enter its order and certify the same to the county clerks of the proper counties as hereinbefore set forth in this section. The notice provided for in this section shall be mailed to the county clerk, county assessor, and chairman of the County Board. From any final decision of the state board of equalization and assessment, any person, county or municipality affected thereby may prosecute a writ of error to the supreme court and upon demand therefor the state board shall prepare and certify a transcript of its records and proceedings involved in such decision, upon payment by the party demanding the same of a fee of ten cents for each one hundred words. Notice of intention to obtain a review shall be filed within ten days from the date of entry by the board, and when docketed said cause be given precedence by the supreme court over all civil cases."

Sec. 5904:

"The state board shall determine the amount of all taxes required for state purposes, and the rate of taxation upon all tangible property in the state necessary to raise the same, and make a levy of such taxes throughout the state. The rate of the general state tax on tangible property together with the state tax on intangible property shall be sufficient to realize the amount necessary to meet appropriations made by the legislature for the year in which the tax is levied, and an additional sum not exceeding twenty per cent. of the amount of any existing state indebtedness."

Sec. 5005:

> "On or before the second day of August in each year the state board shall transmit to the county clerk of each county a statement of the rate of taxation required for the general state tax, the state school tax and any other general or special taxes, as directed to be levied and collected by the state board."

Complainant further alleges that Section 5996 provides:

> "The county treasurers of the several counties of this state shall be ex-officio county collectors of all taxes levied within their respective counties. No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the treasurer's office and pay his taxes."

Sections 5997 to 6017, inclusive, prescribe a procedure to be followed by the treasurer in collecting all taxes and authorizes him to issue distress warrants for the collection of taxes, in which the personal taxes become delinquent on December 1st of each year.

VIII.

Plaintiff in accordance with the statutes of Nebraska made a report to the State Board of Equalization and Assessment, and the county assessors, of the various counties in the state into or through which its lines of railway were constructed and are operated strictly in accordance with the law; that prior to the assessment of plaintiff's property, plaintiff as in prior years stated and complained to said State Board of the over-valuation of its property and the under-valuation of all other property except railroad property in the assessments made in prior years in the manner and to the extent hereinafter alleged; and regardless of said complaint or statement subsequently and on the 15th day of June, 1923, the State Board of Equalization and Assessment fixed the valuation of that part of

plaintiff's property in Nebraska by it claimed to be authorized to be assessed for taxing purposes at $137,589,782.00 on a basis of 2,861.5 miles of single track, the order being in the words and figures following, to-wit:

"Governor's Office, State Capitol,
"Lincoln, Nebraska,
June 15th, 1923.

"* * * The question of the 1923 assessment of the railroad being under consideration, Governor Bryan presented the following resolution: *Resolved,* That we, the State Board of Equalization and Assessment, in regular session held for the purpose of valuing and assessing the railroads in the State of Nebraska, for the purpose of taxation of their property in the said state, and having given due and full consideration to the returns furnished said Board, by the several railroad companies and having taken into consideration the main track, side track, spur track, warehouse tracks, road bed, right of way and depot grounds, and all machinery, rolling stock, telegraph lines and instruments connected therewith, all material on hand, and supplies, monies, credits, franchises, and all other property of said railroad companies, and having taken into consideration the gross and net earnings of the said railroads, the total amount expended in operation and maintenance, the dividends paid, the capital stock of each system or road, and the market value thereof, and the total amount of secured and unsecured indebtedness, and from all the information which we are able to obtain, do hereby ascertain, appraise, fix and assess for the purpose of general taxation, the full actual value of the property of each of the several systems or companies in the State of Nebraska, as hereinafter recited:

Railroad	Miles of Track	Total Actual Valuation
Chicago, Burlington & Quincy	2861.60	$137,589,782.00

which resolution was there and then adopted.

That in arriving at said valuation of the plaintiff's property in the State of Nebraska for the purpose of taxation for the year 1923 plaintiff alleges that the State Board did not make any re-valuation thereof, but simply adopted and used the valuation made by the said State Board of said property in the year 1922, said 1923 valuation being in accord in every detail with the valuation thereof in 1922 and plaintiff alleges that the said valuation so made by said State Board in 1922 and 1923 were arrived at by the following erroneous principles and improper modes of estimating values and plaintiff alleges that, instead of giving fair and careful or any consideration to the various factors recited in the resolutions fixing the value upon the plaintiff's property in said years, the said State Board wrongfully and improperly and in violation of this plaintiff's rights, arrived at said valuation each year by the use of the following formula:

Net earnings in Nebraska for year ending Dec. 31, 1921, as had been previously reported by the plaintiff.....	$ 13,739,401.04
Assessed value of plaintiff's property for 1921, as fixed by the State Board.....	131,755,725.00
6% of which is.....	7,905,343.50
This deducted from net earnings leaves....	5,834,057.54
Which added to the 1921 valuation gives... the amount of the assessment for 1922.	137,589,782.00

That the said State Board excluded a recitation of the use of said formula in its resolutions fixing said values in said years for the purpose of misleading the plaintiff and for the fraudulent purpose of sustaining said unjust and discriminatory valuation each year; that in July, 1922, and in July, 1923, at the hearings, as provided by Sec. 5901, before the State Board of Equalization the plaintiff presented to the State Board the fact that it had and it now herein

alleges that in reporting its net earnings for the year ending December 31, 1921, in the State of Nebraska to the State Board of Equalization, it made an error in the amount thereof in that it erroneously reported net earnings in the sum of $13,739,401.04 when the correct net earnings computed in accordance with the accounting regulations of the Interstate Commerce Commission were the sum of $9,870,987.36, a difference of $3,868,413.64; that, notwithstanding the fact that said error and the corrected amount of net earnings for said period was established by the plaintiff before the said State Board of Equalization and Assessment without dispute, the said State Board wrongfully, improperly and intentionally in both the years 1922 and 1923 refused to make any correction of said valuation and approved, ratified and affirmed the valuation as ascertained by said erroneous formula.

IX.

As it was the State Board that made the foregoing erroneous assessment of plaintiff's property while it was acting as assessor, plaintiff notified the State Board at and during its meeting which convened on the first Monday of July, A. D. 1923, pursuant to the provisions of Section 5901, that the assessing officers and Equalization Board in their respective counties for taxation purposes for the year 1923 assessed all property within their jurisdiction at not to exceed sixty per cent of the actual value of such property.

That the said State Board then well knew that the constitution and laws of Nebraska provided that all property in the state subject to taxation should be valued at its actual value for taxing purposes on the same basis used for the valuation and assessment of all other classes of property not exempted by law from taxation; that if the

valuation of complainant's property in 1923 for taxation purposes should not be reduced to the same percentage of value that other property subject to taxation in said state has been valued for assessment purposes by the several county assessors and boards of equalization in 1923 or unless the valuation of all other such property should be increased from sixty per cent of its value to its actual value, complainant would be denied the equal protection of the law guaranteed by the Constitution of the United States and the State of Nebraska, and its property would be taken for public purposes without just compensation and without due process of law, in derogation of the Fifth and fourteenth Amendments to the Constitution of the United States, and of Sections 3 and 21 of Article 1 of the Bill of Rights of the Constitution of the State of Nebraska.

That notwithstanding all of said knowledge and notice of inequality of the assessment of this carrier's property as compared with that of all other classes of property the said State Board at its meeting made no change in the assessment of the value of your complainant's property either by reducing it to the same basis as that upon which all other property was valued nor by increasing the assessed value of all other property to its actual value as required by the constitution and laws of the State but did make some slight material equalization as between counties and by its final decision and resolution as of July 30, 1923, intentionally maintained and preserved the inequalities in valuation of the several classes of property and retained the valuation of your complainant's property at 122+% of its actual value, while in the final adjustment *all* other property in the State of Nebraska (including real estate) was assessed not to exceed sixty per cent of its actual value. The said State Board thereupon de-

termined the amount of all taxes required for state purposes and made a levy therefor.

X.

Plaintiff further alleges that pursuant to Section 5905 the State Board on August 2nd, 1923, certified said levy and the results of its equalization to each of the respective county clerks, and a statement of the rate of taxation required for general state tax, the state school tax, and all other general or special taxes directed to be levied and collected by the State Board, and the result of its proceedings and orders as a State Board of Equalization and Assessment, and thereupon the power terminated of the State Board of Equalization and Assessment with respect to the assessment of valuations and the equalization of the values of property for taxation in the State of Nebraska for the year 1923. Thereafter there is no power vested in the State Board to recall or revise said decisions nor power to direct any of the officers to amend said decisions whose duty it is to transcribe, certify and collect said taxes upon said valuation. That plaintiff neither has nor had remedy whatsoever to obtain relief under the administrative provisions of the Nebraska statutes, for the wrongs and injuries imposed upon it by the conduct of the respective assessing officers and Boards of Equalization in the State of Nebraska; that plaintiff's rights under the Constitution of the State of Nebraska and of the United States, hereinbefore set forth, so as aforesaid, violated by the assessment made of all property in the State of Nebraska other than railroad property, for taxation at sixty per cent of its actual value, and the assessment of plaintiff's property for such taxation at 122 per cent plus of its actual value, could be protected solely by proceedings in the courts; that no action at law in the Federal Courts was available to plaintiff for the protection of its rights.

That during 1923, and for a long time prior thereto, Sections 9127 and 9128 of the Compiled Statutes of Nebraska for 1922 were in full force and effect; that the Supreme Court of the State of Nebraska construes these sections to permit the prosecutions of proceedings in error to a district court of a county wherein an adverse ruling has been made by a Board of Equalization of complaints by tax payers to the effect that their property has been valued at more than 100 per cent of its actual value, but not that it was assessed at a greater fraction of its actual value than the property of other taxpayers. In those proceedings if there was so much as a scintilla of evidence to sustain the rulings of the Boards of Equalization those rulings were sustained, and no relief could be secured through such proceedings unless there had been a total lack of power in the Board of Equalization to act. By the enactment of Section 5901, as amended in 1921, Compiled Statutes of Nebraska, 1922, a doubtful remedy is given to any person, county or municipality complaining about the equalization by the State Board of any classes or kinds of property in any county or tax district, but the authority to act with respect to railroad property is restricted to railroads entirely within a county, that those railroads with their property, such as complainant, extending into more than one county are by said terms excluded as separate property owners from consideration by said Board, that it will be necessary, if plaintiff could or should prosecute a petition in error to the Supreme Court of the State complaining of the valuation of its property, that it include all railroad property in the State of Nebraska of these railroads extending into more than one county, and make proof with respect to its value and valuation as a class. Because of the burden imposed upon complainant or any other railroad to prove not only over-valuation of its own property, but of all other railroad property in the

state as compared with the valuations of other classes of property for taxation under Section 5901, supra, and because of the refusal of the courts of the state to consider any subject upon such proceedings in error other than the actual value of the complaining party's property, and its refusal to consider under-valuation of other property within the state, plaintiff was and is without adequate remedy at law and has no remedy at law and has no remedy in the premises for the protection of its rights under the Constitution of the State of Nebraska and of the United States, as hereinbefore set forth, except by an action in equity in the Federal Court.

Plaintiff further alleges that the valuation per mile of plaintiff's property fixed by the State Board of Equalization and Assessment and certified on and before August 2, 1923, to the County Clerks was forthwith by those clerks transcribed upon the tax lists of their respective counties, and became a lien upon all the plaintiff's property and a charge against the plaintiff; that the valuation per mile so illegally fixed by the State Board of Equalization and Assessment, by the County Clerks has been applied per miles to the levies provided by law for raising revenue for state, county, township, school district and other purposes, that these taxes became due November 1st, 1923, and delinquent December 1st, 1923.

Plaintiff further alleges that these tax lists were duly certified by the County Clerks and transmitted to the County Treasurer in each of the counties, and it thereby became the treasurer's duty to collect all of these taxes, including taxes levied for and on behalf of the State in the collection of which they act as agents of the State. The defendants contend that all of the taxes levied against plaintiff and its property for the year 1923, for all pur-

poses, are valid and legal and should be paid, and that it is their duty as such County Treasurers to collect the same. Section 5996, Compiled Statutes of Nebraska, 1922, amongst other things, provides that:

> "No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the Treasurer's office and pay his taxes."

Section 6017, Compiled Statutes of Nebraska, 1922, provides:

> "When any corporation doing business in this state shall fail or neglect to pay any tax assessed or charged against it, when the same shall have become delinquent, the County Treasurer shall notify any agent or officer of the company in the county where such tax is delinquent that the same is delinquent, and the amount due, and shall further notify the officer or agent to pay over all moneys that may be in his hands, or that may afterwards come into his hands, belonging to such corporation, not exceeding the amount of tax due, to such county treasurer; and if such agent or officer shall fail to pay over the money to the county treasurer, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty dollars, nor more than five hundred dollars."

Section 6020, Compiled Statutes of Nebraska, 1922, provides:

> "No county or town board, city council or village trustee shall have power to release, discharge, remit or commute any portion of the taxes assessed or levied against any person or property within their respective jurisdictions for any reason whatever. Any taxes so discharged, released, remitted or commuted, may be recovered by civil action from members of any such board, council or trustee, and the sureties on their official bonds at the suit of any citizen of the county, township, city or village, as the case may be, and

when collected shall be paid into the proper treasury. Nothing in this section contained shall be construed to prevent the proper authority from refunding taxes paid as provided in the two next preceding sections, nor to interfere with the powers of any officers or board sitting as a board for the equalization of taxes."

Section 4 of Article VIII of the Constitution of Nebraska provides:

"The legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its *proportionate share* of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

Section 6010, Compiled Statutes of Nebraska, 1922, makes it the duty of the County Treasurer, on the first day of February next following the year in which the personal taxes may have been levied and yet remain unpaid, to issue distress warrants to collect such taxes, the taxes therein described to be collected by levy and sale of personal property of the taxpayer as upon execution. The Nebraska statutes also provide that all taxes levied upon railroad property shall be considered taxes upon personal property.

There is no statutory authority in Nebraska for the payment under protest of less than 100 per cent of the taxes levied against any taxpayer other than and unless some part of the tax shall have been levied for an unlawful or illegal purpose, nor is there any statute authorizing plaintiff to pay any part of its taxes under protest so that it can recover a part thereof by legal proceedings or otherwise, unless the part sought to be recovered was levied for an illegal or unauthorized purpose.

XI.

Plaintiff further alleges that the defendant Tax Commissioner and his predecessors while in office, and the State Board of Equalization and Assessment have notwithstanding plaintiff's yearly complaint, continually decreased annually the assessed value of all property other than railroad property, but more particularly for this suit commencing with the year A. D. 1920, and during said time has likewise continually increased the valuation of plaintiff's property within the State of Nebraska, which is accurately described by the following figures:

Total Value of Lands and Improvemetns in Nebraska
Year 1920, $2,144,473,350.00, being 68% of its actual value
Year 1921, $1,831,048,877.00, being 53% of its actual value
Year 1922, $1,753,312,300.00, being 62% of its actual value
Year 1923, $1,787,276,553.00, being 54% of its actual value

C., B. & Q. Total Valuation for Said Years are:

Year 1921	$131,755,655.00
Year 1921	131,755,725.00
Year 1922	137,589,782.00
Year 1923	137,589,782.00

That during each of said years, except the year A. D. 1923, the actual value of plaintiff's property did not exceed $100,000,000.00, and for the year 1923 it did not exceed $112,216,231.00.

The result being that the lands and all other property did not pay taxes on to exceed 50% of their actual value for the years 1920 or 1921, and for the year 1922 did not exceed 65%, and for the year 1923 will not pay taxes to exceed 60% of actual value; while this plaintiff will, if the assessment now complained of is permitted to stand, pay taxes on 122 per cent plus of its actual value.

XII.

Plaintiff alleges that the counties in the State of Nebraska through which plaintiff's railways are constructed and operated and were thus constructed and operated during all the time that the petition alleges, are correctly stated in the schedule next following; the amount of taxes levied against plaintiff's property in each of said counties for other than city and village purposes and the amount thereof alleged to be illegal are also correctly set forth in the schedule, which is as follows:

County	Tax Levied	Illegal Part
Adams	$40,994.71	$16,397.88
Antelope	9,568.52	3,827.41
Blaine	16,822.77	6,729.11
Box Butte	36,437.96	14,575.18
Buffalo	14,706.55	5,882.62
Burt	8,406.78	3,362.71
Butler	13,445.71	5,378.28
Cass	32,686.70	13,074.68
Cedar	6,543.22	2,617.29
Chase	9,010.89	3,604.36
Cheyenne	14,598.10	5,839.24
Clay	42,647.86	17,059.14
Colfax	1,485.28	594.11
Custer	63,324.18	25,329.67
Dawson	2,193.34	877.34
Dixon	10,396.95	4,158.78
Dodge	15,874.79	6,349.92
Douglas	13,619.92	5,447.97
Dundy	44,334.67	17,733.87
Fillmore	49,809.39	19,923.76
Franklin	39,450.77	15,780.31
Furnas	58,786.68	23,514.67
Gage	50,618.43	20,247.37

County	Tax Levied	Illegal Part
Garfield	1,653.56	661.42
Gosper	10,178.00	4,071.20
Grant	22,042.24	8,816.90
Hall	19,530.20	7,812.08
Hamilton	25,164.56	10,065.82
Hooker	27,616.22	11,046.49
Howard	15,585.35	6,234.14
Johnson	26,896.45	10,758.18
Lancaster	68,501.33	27,400.53
Lincoln	36,245.59	14,498.24
Merrick	9,605.39	3,842.16
Nemaha	14,269.36	5,707.74
Nuckolls	25,033.60	10,013.44
Otoe	18,389.60	7,355.84
Pawnee	25,279.88	10,111.95
Pierce	8,437.65	3,375.06
Polk	1,184.58	473.83
Red Willow	58,283.54	23,313.42
Richardson	36,271.09	14,508.43
Saline	45,655.06	18,262.02
Sarpy	34,540.87	13,816.35
Saunders	41,886.92	16,754.77
Scotts Bluff	34,488.34	13,795.34
Seward	29,057.80	11,623.12
Sherman	26,868.11	10,747.24
Sioux	12,187.47	4,874.99
Thayer	23,567.50	9,427.00
Thomas	29,183.92	11,673.57
Thurston	13,490.18	5,396.07
Valley	15,175.00	6,070.00
Webster	38,523.90	15,409.56
Wheeler	1,633.62	653.45
York	27,469.95	10,987.98

Because of official tax statements not being received for the year 1923 plaintiff on information and belief alleges that for the year 1923 the taxes for the nineteen following counties, with the illegal portion will be as follows:

County	Tax Levied	Illegal Part
Dakota	$12,707.13	$ 5,082.85
Dawes	23,755.86	9,502.34
Frontier	20,481.78	8,192.71
Greeley	18,678.44	7,471.38
Harlan	66,728.73	26,691.49
Hayes	3,657.76	1,463.10
Holt	8,904.30	3,561.72
Hitchcock	44,871.83	17,948.73
Jefferson	23,319.92	9,327.97
Kearney	38,350.86	15,340.34
Morrill	28,703.66	11,481.46
Perkins	25,272.56	10,109.02
Phelps	31,693.22	12,677.29
Platte	2,489.35	995.74
Sheridan	35,626.58	14,250.63

Plaintiff owns property in each of said counties, subject to execution in a sum in value far in excess of the amount of the taxes levied against plaintiff in said counties for 1923.

XIII.

Plaintiff further alleges that the State Board in its resolution adopted on June 15th, 1923, valuing and assessing plaintiff's property in Nebraska, recites that there was considered, with other classes of property, plaintiff's moneys, credits, net earnings, dividends paid, the capital stock and market value thereof. That as to this, plaintiff alleges that included in the gross value of its property are

the values of credits, investments and securities and tangible property not used in the operation of its railroad in Nebraska or elsewhere, and having no relation thereto. Nor do those properties increase the value of plaintiff's tangible or intangible property in the State of Nebraska. Plaintiff in 1923 and preceding years owned other tangible property located without the State of Nebraska and assessed and taxed in the states of its location separately and apart from the railroad at the places where it was so assessable and taxable in conformity to the laws of the respective states where such properties are situated. Likewise plaintiff owned property in Nebraska not subject to assessment by the State Board of Equalization and Assessment. All of this property is described and valued as follows:

Elevator Investments, Chicago & Burlington			$ 357,103.71
Coal Investments, Illinois			3,004,500.68
Sundry Investments			4,658,985.21
Union Depot Securities			175,349.12
Investments in Terminals			5,694,575.92
Miscellaneous Bonds			4,428,393.35
*Stocks and Bonds of Roads Held for Control			27,937,421.97
Cash and Cash Assets—Balance			24,403,472.31
Local Property,	Illinois		11,500,000.00
"	"	Iowa	645,000.00
"	"	Iowa (Woodbury County)	13,820.00
"	"	Wisconsin	48,000.00
"	"	Minnesota	77,500.00
"	"	Missouri	7,867,500.00
"	"	Kansas	267,300.00
"	"	Nebraska, Outside Lots and Lands	1,310,000.00
"	"	Nebraska, Shops, Headquarters, etc.	2,075,000.00

"	"	South Dakota	35,320.00
"	"	Wyoming	152,220.00
"	"	Colorado	600,000.00
Total			$95,911,462.27

*Includes cost of Colorado & Southern Ry Stock, $19,643,451.88.

The values of all of said properties and the income derived therefrom are reflected in the market value of plaintiff's stocks, bonds, surplus and dividends, and the value of said property so elsewhere assessable and taxable for the year A. D. 1923 aggregates $95,911,462.27. In harmony with the statutes of Nebraska and to assist the Board in arriving at a just valuation of plaintiff's property within the State of Nebraska plaintiff with other items submitted the foregoing items of property situate without the State of Nebraska separate from that locally assessed in Nebraska and beyond the Board's jurisdiction. Notwithstanding the statements were so furnished, the State Board intentionally, systematically and unlawfully included said property in ascertaining and assessing the value of plaintiff's property for 1923, and likewise for the years A. D. 1920, 1921 and 1922, and preceding years. That the same was included within the valuation made by the State Board for 1923. Plaintiff further alleges that in so far as said properties were considered by the State Board and taken as a part of the valuation of plaintiff's property, their action was illegal and that the value of said properties in the aforesaid sum should have been deducted before ascertaining and assessing that part of the value allocated to the State of Nebraska. Plaintiff is entitled to a reduction of its valuation so made by the State Board for taxation by the

percentage allocated to the State of Nebraska by the Board which plaintiff alleges is not less than 22.89 per cent for the year A. D. 1923, or a total of $21,954,133.71.

XIV.

Plaintiff further states that the State Board of Equalization and Assessment and the several county assessors and county boards of equalization of the State of Nebraska, have for many years last past, including 1923, assessed and valued farm land in the State of Nebraska at much less than the true value thereof, to-wit, about 54% of its actual value; that the provisions in the statutes that the real estate shall be assessed separately from the improvements thereon, permits the local assessors and taxing officers to, and on information and belief plaintiff alleges that they uniformly do, assess the improvements at but a small fraction of their actual value, to-wit, not to exceed 10 to 25 per cent of their actual value, and where buildings thereon, frequently expensive in character, are constructed upon land, the local assessors for years have ignored such improvements, and do not assess them at all. That during the year 1920 farm land in the State of Nebraska constituted more than fifty-five per cent of the value of all property in the state, other than railroad property, and the county assessors and the State Board of Equalization and Assessment fixed for taxing purposes the value of such real estate at but sixty-eight per cent of the true value of such farm lands; that the valuation of farm lands in the State of Nebraska as returned by the county assessors of the several counties, and as adjusted and equalized by the State Board of Equalization and Assessment for the year 1921 was fixed at but fifty-three per cent of the true value of said farm lands; that the valuation of farm lands in the State of Nebraska for the year A. D. 1922

was likewise under-valued for taxing purposes, and their valuation fixed at not to exceed sixty-two per cent of their true value by the local taxing authorities; that such under-valuations for taxing purposes by said officials was the result of a systematic, intentional, notorious and continuous under-valuation of farm lands by the several county assessors and the State Board of Equalization and Assessment, for taxing purposes; that in 1923 the value of all farm lands in the State of Nebraska were by virtue of Section 5955 the same as that of 1922, there being no re-valuation of farm lands for the year A. D. 1923, but the value so fixed in 1922 did not exceed 54% of their true value for the year A. D. 1923; and the State Board of Equalization and Assessment knowingly and intentionally joined and participated in further pursuance of the scheme and plan that had obtained for many years, and yet obtains in the State of Nebraska, to under-value farm lands for taxation for the purpose of relieving such lands and their owners of their just share of the burdens of taxation by refusing to raise said valuation, or to equalize it with the properties of your plaintiff. In that behalf plaintiff alleges that W. H. Osborne, as Secretary of the State Board of Equalization for the year 1920 published a statement showing the result of the valuation by the county assessors as equalized by the State Board of Equalization with respect to farm lands as follows:

> "The abstracts of assessment have been received covering lands and improvements for all the counties except Arthur. The returns show that the precinct assessors and other local assessing officials throughout the State, have placed a value on lands and improvements which average over 68 per cent of the average value as established by the ratio process based on actual sales. It would seem only fair and just that the State Board would accept this average

valuation established by almost 2,000 precinct assessors and in equalizing the land and improvements between counties, maintain, as nearly as possible, for each county, an assessed actual valuation of 68 per cent of the actual value as established by the ratio process."

And plaintiff alleges and charges that for the year 1920 the valuation of farm lands for taxing purposes in Nebraska was equalized and fixed by the State Board of Equalization at only 68 per cent of the true value thereof in violation of the Constitution and Laws of the State of Nebraska, as above set forth.

Plaintiff further alleges and charges that the adoption of said valuation of 68 per cent for the year 1920, on real estate was intentional and deliberate and pursuant to concerted action by the State Board of Equalization and the several county assessors and in that behalf alleges and charges that the State Board of Equalization made and published a statement of the result of its action as a Board of Equalization for the year 1920 as follows, to-wit:

> *"In the matter of equalization between counties, the State Board has adhered to the early announced plan of accepting for valuation purposes the average value placed on lands and improvements by the precinct and county assessing officials.* For equalization between counties, the value returned by the assessing officials of each county has been compared with the average real value, as established by the ratio process, based on bona fide sales from July 1, 1918, to July 1, 1919. The equalization of the counties on the basis of the sale was requested by the Board at the meeting of the assessing officials of the counties held July 20, 1920. The ratio process, used in correcting the sale averages, is the plan used by Wisconsin for a number

of years, and Minnesota and other states have adopted the same plan.

"Under this plan of equalization, the State Board has the combined judgment as to value, of the assessing officials of the counties and of the buyers and sellers of real estate for a year's period. The year taken was previous to the land boom and does not cover the period of the highest prices.

"The valuations as returned by the County Boards averaged 68 per cent of the real value, as determined by the ratio process, and the State Board adopted this 68 per cent as the basis for equalizing purposes."

Plaintiff further alleges and charges that the State Board of Equalization and the County Assessors of the several counties, pursuant to said purpose and plan to undervalue all farm lands in the state for taxing purposes for the year 1921 met in convention at the City of Lincoln on the 18th day of March, 1921, and adopted a resolution in words and figures following to-wit:

"Resolutions adopted at State Assessors' Meeting, March 18, 1921. At a meeting of the County Assessors, held at Lincoln, Nebraska, on March 18, 1921, the following resolution, introduced by Harry W. Scott, of Pawnee City, was adopted:

"'WHEREAS, there has been an expression representing the sentiment of sixty-four counties and the result of such expression seems to average fifteen per cent reduction under 1920 real estate values.

"'THERFORE, BE IT RESOLVED, that it be the sense of this meeting that the aggregate return of the value of real estate in each county be returned to the State Board at not to exceed a 15 per cent reduction.

"'It being understood that this shall in no way be binding upon any county, but merely suggests a uniformity of action.

"'Dated this 19th day of March, 1921.

"'(Signed)—G. L. MUNFORD, *Secretary-Treasurer.*"

Plaintiff further alleges and charges that W. H. Osborne, then as Tax Commissioner, provided each and every county assessor in the State of Nebraska with a copy of said resolution and stated to said assessor in writing as follows:

> "The above and foregoing is a verbatim copy of a resolution adopted by the County Assessors of the State, at their meeting, held in the City of Lincoln, on March 18, 1921, and it is requested by this department that you read the resolution over carefully, *so that the result of their labors will be in accordance with the thought of the conference.* We very much desire to avoid the necessity of being compelled to again equalize to any great extent by counties this year, feeling as we do, that we have a very good equalization over the state at this time, but where the occasion demands, the State Board will not shirk its duty to fairly and equitably raise or to lower any county, to the end that each bears its just relation, one to the other."

Plaintiff further alleges and charges that the said several county assessors, pursuant to said express purpose, returned the valuation of real property in their respective counties at only about 53 per cent of the true value thereof, and that the State Board of Equalization upon receiving said returns from the said several counties equalized the valuations on real property so that the average valuation does not exceed 53 per cent of the true value of real property in the State of Nebraska for the year 1921; that said concerted action by the said county assessors and the State Board of Equalization to return a valuation for taxing purposes on real property of only about 53 per cent of the true value thereof, was

in violation of the Constitution and Laws of the State of Nebraska and in violation of the duties of said officials and in violation of the rights of the plaintiff, whose property has been fixed by said Board of Equalization at more than the true full actual value thereof.

That because the taxing authorities of the State of Nebraska were cognizant of the fact that the railroad companies of the State of Nebraska were making extensive investigations to bring into view the truth with respect to the undervaluation of farm lands in the State of Nebraska, the Tax Commissioner issued his instructions to county and precinct assessors in Nebraska in 1922, advising them that it was their duty, as follows:

> "We will first take up the Rural Real Estate Assessment which must be made again this year. Those of you who are familiar with the old Revenue Law will recall that prior to 1921, real estate was only assessed once every four years, but the legislature of 1921 passed a law requiring the new assessment pertaining to real estate should be made in 1921, again in 1922, and every two years thereafter. Real estate generally, was reduced approximately fifteen per cent uniformly over the state in the year 1921. This emergency legislation on the part of the Legislature was made in the hope that some relief could be given the owner of real property in the way of taxes, but such was not the case, for, notwithstanding the fifteen per cent reduction in the valuation of real property uniformly over the state, this reduction was not reflected in the real estate tax receipt, nor could it be, for the reason that there is obviously only one way to accomplish this result, and that is lower the expenditures of the state and its taxing subdivisions. We are compelled to make another assessment of real estate this year, 1922, which will stand for two years or until 1924, when another assessment will be made. The only instructions that

I am permitted to give you in valuing this class of property is that directed to you by the statutes, namely at its *actual value*, and as defined in the Revenue Law, Actual Value means its actual value in the market in the ordinary course of trade."

Plaintiff alleges that the purpose and intent of issuing the instructions in the above form was to encourage county and precinct assessors to further depreciate the value of real estate for taxing purposes under the undervaluations of the preceding years, and that in harmony with such intent and instructions, the county assessors did further in 1922 undervalue farm lands for the purpose of taxation.

That as hereinbefore alleged and set forth and contained in the instructions to the precinct assessors in the year 1922 there was no re-valuation of farm lands and improvements for the year 1923 except that new improvements were added thereto.

XV.

Plaintiff further alleges that in accordance with Section 5977, Comp. Statutes of Nebraska, 1922, the County Assessor of each county in the State of Nebraska prepared an abstract of the assessment rolls of his county, and forwarded it to the State Board of Equalization and Assessment before the 10th day of July, 1922; each abstract disclosed the total number of acres of taxable land in each county, the aggregate assessed value of all taxable lands; and the average assessed value per acre of all taxable land; all abstracts revealed, and the plaintiff alleges the fact to be, that there were at the time hereinbefore mentioned, and now are, in the State of Nebraska, forty-six million four hundred twenty-one thousand six hundred forty-seven (46,421,647) acres of taxable land.

These abstracts also disclose the aggregate assessed value of all town lots and personal property in each county, and the total assessed value of all taxable property other than railroad property therein.

In harmony with Section 5901, Comp. Stat. Neb. 1922, the State Board of Equalization and Assessment met at the State Capitol in the month of July, 1922, examined the abstracts of property assessed for taxation in the several counties of the State, and equalized those assessments as between counties, but made no substantial change in the aggregate assessed valuation of taxable land or of real estate or personal property.

These abstracts as equalized and the resultant tax lists show that the aggregate *assessed value* of all taxable land, including improvements thereon, exclusive of railroad lands, in the State of Nebraska for 1922 was *One Billion Seven Hundred Fifty-three Million Three Hundred Twelve Thousand Three Hundred Nine Dollars* ($1,753,312,309.00) and for the year A. D. 1923 is *One Billion Seven Hundred Eighty-seven Million Two Hundred Seventy-six Thousand Five Hundred Fifty-three and no/100 Dollars* ($1,787,276,553.00), and that the *average assessed value* per acre of all taxable lands, including improvements thereon, in the State of Nebraska for 1922 was *Thirty-seven and 77/100 Dollars* ($37.77), and for 1923 is *Thirty-nine and 30/100 Dollars* ($39.30).

Plaintiff further alleges that the *actual value* of all taxable land, and improvements thereon, in the State of Nebraska for the year 1922 in the market in the ordinary course of trade was in excess of the aforesaid sum, and that the actual value thereof in the market in the ordinary course of trade was at least *Two Billion Six Hundred Ninety-seven Million Four Hundred Three Thousand Five Hundred Fifty-one and no/100 Dollars*

($2,697,403,551.00), or at least *Fifty-eight and 10/100* ($58.10) per acre; and for the year A. D. 1923 is in the aggregate *Three Billion Three Hundred Nine Million Seven Hundred Seventy-one Thousand Three Hundred Ninety-four and no/100 Dollars* ($3,309,771,394.00), being not less than *Seventy-two and 77/100 Dollars* ($72.77) per acre.

Plaintiff further alleges that said abstracts as equalized and the resultant tax lists show that the *aggregate assessed value* of all town lots, including improvements thereon, in the State of Nebraska for the year 1922 was *Five Hundred Thirty-nine Million Seven Hundred Thirty Thousand Seven Hundred Eighty-five and no/100 Dollars* ($539,730,785.00), and for the year A. D. 1923 is *Five Hundred Fifty-six Million Four Hundred Thirty-three Thousand Eight Hundred Fifty-six and no/100 Dollars* ($556,433,856.00).

Plaintiff further alleges that the *actual value* of all town lots, and improvements thereon, in said State of Nebraska for the year 1922 was and is in excess of the aforesaid equalized value and instead thereof the *actual value* in the market in the ordinary course of trade was at least *Eight Hundred Thirty Million Three Hundred Fifty-five Thousand Fifty-three and 80/100 Dollars* ($830,355,053.80), and for 1923 is *One Billion Thirty Million Four Hundred Thirty-three Thousand, Sixty-six and no/100 Dollars* ($1,030,433,066.00).

Plaintiff further alleges that the said abstracts as equalized and the resultant tax lists show that the *aggregate assessed value* of all personal property other than property subject to assessment by the State Board of Equalization and Assessment in the State of Nebraska for 1922 was *Five Hundred Thirty-one Million Two Hun-*

dred Forty-five Thousand One Hundred Eighty-six and no/100 Dollars ($31,245,186.00), and that the *actual value* of all said personal property in said state for the year 1922 in the market in the ordinary course of trade was in excess of the aforesaid equalized value and instead thereof the *actual value* was at least *Eight Hundred Seventeen Million Three Hundred Thousand Two Hundred Eighty-six and no/100 Dollars* ($817,300,286.00).

That for the year A. D. 1923 the equalized value of the personal property contained in the abstracts forwarded by the county assessors of all personal property other than property subject to assessment by the State Board of Equalization and Assessment in the year 1923 is $539,277,965.00, and that the actual value of all of said property in said state for the year 1923 in the market in the ordinary course of trade is in excess of the aforesaid equalized value and instead thereof the actual value is $998,662,898.00.

Plaintiff further alleges that by the action of the assessors of the various counties of the State of Nebraska, and of the State Board of Equalization and Assessment, the value of taxable land in the State of Nebraska other than railroad lands so fixed for the purpose of assessment and taxation as the basis or taxable value upon which to compute taxes under the laws of the State of Nebraska, in truth and in fact represents not to exceed sixty-five per cent (65%) of the real value of said taxable land in the market in the ordinary course of trade and of the reasonable value thereof for the year 1922 and is not more than 54% of the value of said taxable lands in the State of Nebraska for 1923 in the ordinary course of trade, and plaintiff avers that the taxable lands in the State of Nebraska constitute and comprise fifty-five per cent (55%) of the taxable property in the State of

Nebraska subject to assessment and taxation and compose sixty-one per cent (61%) of said taxable property exclusive of railroads.

Plaintiff further alleges that the value of its property in the State of Nebraska subject to assessment by the State Board of Equalization and Assessment under the laws of the State of Nebraska for 1920, 1921 and 1922 did not exceed *One Hundred Million Dollars* ($100,000,000.00) and for the year A. D. 1923 does not exceed *One Hundred Twelve Million Two Hundred Sixteen Thousand Two Hundred Thirty-one and no/100 Dollars* ($112,216,231.00); that plaintiff owns and operates 2,861.60 miles of railroad in the State of Nebraska, and that the value of said property so subject to assessment by said Board therefore, does not exceed *Thirty-nine Thousand Three Hundred Dollars* ($39,300.00) per mile; but plaintiff avers that the taxable value of its property subject to assessment by said Board under the laws of the State of Nebraska, when considered in the light of the assessment of taxable land and other real and personal property, except property subject to assessment by the State Board of Equalization and Assessment, in said state, as hereinbefore averred, is not in excess of *Twenty-three Thousand Five Hundred Eighty and no/100 Dollars* ($23,580.00) per mile, aggregating $67,476,528.00 for the State of Nebraska; and plaintiff avers that it is willing to, and will, pay such lawful taxes as are levied upon said last aforesaid sum or value per mile, or upon such other sum as this court may decree represents the fair and equitable taxable value of its property per mile as compared to the ratio the assessed valuation of other taxable property in Nebraska other than railroad property bears to its actual value.

That the systematic assessment upon such basis is, and for many years past has been, a matter of public notoriety in the State; that the fact that such assessors have indulged in such habitual, intentional, systematic and general custom in so assessing taxable land and other real estate and personal property at materially less than its value in the market in the ordinary course of trade, was known to the State Board of Equalization and Assessment at and prior to the time it assessed plaintiff's property; that notwithstanding this knowledge on the part of the said State Board of Equalization and Assessment, it intentionally assessed the plaintiff's property subject to assessment by it at one hundred and twenty-two per cent plus (122%+) of its actual value.

XVI.

Plaintiff further alleges that the action of the Board of Equalization and Assessment, and the several county assessors and county boards of equalization in undervaluing farm lands and other property in Nebraska other than railroad property for the purpose of taxation pursuant to said intention, concerted and pre-arranged plan, while at the same time valuing the property of the plaintiff at more than one hundred per cent (100%) of its true value, as hereinbefore alleged, for taxing purposes, constitutes an unlawful discrimination against plaintiff, and compels it to bear more than its just proportion of the burden of taxation in the State of Nebraska in violation of the Constitution and Laws of the State of Nebraska, as above set forth, and in violation of the guarantees contained in the Enabling Act above referred to as ratified and confirmed by the electors of the State of Nebraska, and in violation of the Fourteenth Amendment to the Constitution of the United States. That the action of the State Board of Equalization and Assessment and

of the several county authorities in intentionally and systematically undervaluing farm lands, constituting fifty-five per cent of the taxable property of the State, while requiring plaintiff to pay taxes on the full actual value and more of its property, constitutes an unjust and unlawful discrimination against plaintiff, and denies to plaintiff the equal protection of the law guaranteed by the Constitution and Laws of Nebraska, guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and deprives plaintiff of its property without due process of law, takes its property for public use without compensation, in violation of the Fourteenth Amendment to the Constitution of the United States.

XVII.

Plaintiff further alleges that the intentional and systematic under-valuation by the State Board of Equalization and the several county assessors of farm lands within the State of Nebraska, being about fifty-five per cent of the total taxable property in said state, at only 54 per cent of the true value thereof, for taxing purposes, while valuing the property of the plaintiff at 122 per cent plus or more of its true value, and requiring plaintiff to pay taxes on said value constitutes and is an unlawful burden upon interstate commerce in that more than 68 per cent of the commerce carried by plaintiff over the lines of its railroad in the State of Nebraska is interstate in character; that all taxes which plaintiff is required to pay in the State of Nebraska are chargeable to expenses of operation, and that for the defendants, by said unlawful and intentional discrimination in valuation between plaintiff and other taxpayers in the state, to impose an undue and unlawful expense upon the handling of interstate commerce, constitutes and is an unlawful discrimination against interstate commerce and an

unlawful burden thereon in violation of the Constitution of the United States.

XVIII.

Plaintiff further alleges that it is entitled to the equal protection of the laws of the State of Nebraska, which make it the duty of the State Board of Equalization and of the several county assessors to value all property in the state at its true, full, actual value; that the State Board of Equalization has full power to correct any inequality of valuations which may be returned by the several county assessors, and it was the duty of said Board of Equalization so to do, but plaintiff alleges that said Board, in violation of the Constitution and Laws of the State of Nebraska, not only did not change said valuation so as to put plaintiff upon a basis of equality with other taxpayers, as required by law, but said Board intentionally co-operated with the county assessors for the purpose of returning the true value of farm property at only 54 per cent of the true value thereof for taxing purposes while requiring the plaintiff to pay taxes upon more than the full actual value of its property within the state.

That the several actions of the taxing authorities denies to plaintiff the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

XIX.

Plaintiff further alleges that it stands ready and is willing to pay in full all taxes levied against it in the respective counties for city and village purposes, all of which are not involved in this case nor herein complained of, and that plaintiff is able, ready and willing at all times to pay sixty per cent of said taxes, with interest accruing,

if any, from the first of November, 1923, and is able, ready and willing to pay a greater percentage of said taxes for state, county, school district, township, road district and other like purposes, if in the judgment of the court any greater amount than sixty per cent is lawfully due or should be paid, and plaintiff stands ready and willing at all times to obey a final order of the court in respect thereto and to abide by any interlocutory order this court may make as a condition precedent to issuing an order of injunction from this court as prayed for herein or any application that may be made to this court or to any court to which an appeal might be taken from the judgment rendered herein to determine the legality of the remaining forty per cent of said taxes.

XX.

Plaintiff further alleges that it has no remedy at law for any of the wrongs of which it herein complains, either plain, adequate or complete in any of the courts of the State of Nebraska or of the United States.

XXI.

Plaintiff further alleges and charges that said unlawful taxes constitute a lien upon plaintiff's property and a cloud upon plaintiff's title thereto, that the lien of said taxes against plaintiff's property will unlawfully burden plaintiff in its ability to finance its business as a common carrier of interstate commerce, and cripple, injure, and impair the plaintiff in the operation of its line of railroad as a common carrier of interstate commerce. And plaintiff further alleges that the defendant county treasurers, and each of them, will issue numerous distress warrants against the plaintiff and will cause to be instituted a multitude of suits against the plaintiff for the collection of said unlawful and discriminatory taxes, and will coerce

its agents to pay those taxes unless each of them, their successors in office, agents, employees and all other persons acting by, through or under their authority or direction be restrained from so doing by order of this court.

Plaintiff further alleges and summarises:

First. That the action of the State Board of Equalization and Assessment in fixing as the assessed value of the property of this plaintiff the aforesaid sum of $137,589,782.00, or $48,081.42 per mile, is wholly void in that said action is contrary to and in violation of the provisions of Sections 1 and 4, Article 8 of the Constitution of the State of Nebraska, as hereinbefore set forth, and that said action of said State Board is contrary to the express conditions contained in said provisions of said Constitution and the Laws of said State.

Second. That the said action of the State Board in so fixing the assessment of the property of this plaintiff at the sum of $137,589,782.00, while assessing all other property less than its actual value, as hereinbefore alleged, denies to this plaintiff the equal protection of the laws, and is, therefore, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

Third. That the action of the State Board while valuing plaintiff's property in considering credits, investments and securities, which have no relation to the value of its property or the exercise of the right of plaintiff in the State of Nebraska, is in violation of Sections 1 and 4 of Article 8 of the Constitution of the State of Nebraska.

Fourth. The action of the State Board in so far as it assesses real estate of plaintiff situate in the State of Nebraska at greater value than real estate of citizens and

residents of the State is in violation of the third paragraph of the fourth section of the Enabling Act to admit the State of Nebraska into the Union, and that the property of this plaintiff, a citizen of the United States residing without the State of Nebraska, is taxed higher than the property belonging to residents belonging within the State of Nebraska.

Fifth. That by the action of the State Board of Equalization and Assessment in valuing and fixing the assessment of the property of this plaintiff at more than its actual value, as hereinbefore alleged, and all other property other than railroad property at less than its actual value, subjects this plaintiff to penalties and burdens different from and greater than the owners of other property in the State of Nebraska, and compels plaintiff to bear an unequal and inequitable and illegal proportion of the taxes of the state, county, school, township and other subdivisions, excepting cities and villages, and takes plaintiff's property for public use without compensation or due process of law, in violation of the Fifth and Fourteenth Amendments to the Federal Constitution.

Sixth. That the actions of the State Board as hereinbefore alleged severally and collectively impose an unusual burden upon and an unwarranted interference with interstate commerce.

WHEREFORE, as plaintiff is without remedy at and by the rules of the common law, plaintiff prays:

1. That subpoenaes in equity forthwith issue for the defendants, and each of them, requiring them to answer to the petition of the plaintiff herein, but not under oath, said oath being hereby expressly waived.

2. Plaintiff further prays the court to enter an order prescribing the percentage of actual value of plaintiff's property and of the tax levied, which plaintiff shall tender as its tentative tax to the several county treasurers, defendants herein, and for which they shall issue their several receipts excepting city and village tax to be paid in full for the year 1923, pending the final determination of this suit as soon as said taxes shall become due according to law, not exceeding sixty per cent of the actual value herein claimed for plaintiff's property.

3. That the court issue a temporary restraining order enjoining and prohibiting the defendants severally from demanding collecting or attempting to collect from plaintiff any tax in excess of the portion thereof the court may fix and determine shall now be paid, other than city and village taxes, and from issuing distress warrants, commencing suit to collect any such excess or the interest thereon or any penalties for the non-payment thereof until the hearing and final judgment of the Court as to the issuance of a temporary injunction herein.

4. Plaintiff further prays the Court to issue its order of temporary injunction against the defendants, and each of them, upon due notice as required by law, restraining and enjoining the defendants, and each of them, their employees, agents, successors in office and all persons acting under their authority, from carrying out their said purpose to impose upon the plaintiff said unlawful and discriminatory valuations of its property for taxing purposes, and to restrain and enjoin the defendants, and each of them, from collecting any taxes against the plaintiff upon a valuation greater than that to be fixed by the Court, in accordance with the prayer of this petition. From issuing distress warrants, notices to agents, com-

mencing suit, or imposing any penalty for any excess of the amount fixed by this Court or interest or costs thereon.

5. Plaintiff further prays that upon final hearing the Court will issue its order of injunction forever restraining and enjoining the defendants, and each of them, and their successors in office, and all persons acting for them, or any of them, from collecting from the plaintiff or against its property taxes in excess of the just and fair valuation of plaintiff's property and in proportion to the valuation of the property of other taxpayers, as found and fixed by order of this Court, and plaintiff further prays the Court for a decree declaring null and void the valuation of plaintiff's property as fixed by the said State Board of Equalization, and as now same appears upon the record of the defendants herein, and discharging plaintiff's property from the pretended lien of said unlawful valuation; and plaintiff prays for such other and further relief in the premises as justice and equity may require.

CHICAGO, BURLINGTON & QUINCY RAILROAD CO.

By Byron Clark,
J. L. Root,
J. W. Weingarten and
C. W. Krohl,
Its Attorneys.

STATE OF NEBRASKA }
} ss.
COUNTY OF DOUGLAS }

I, R. D. Pollard, being first duly sworn on oath, depose and say that I am the Tax Agent for the Chicago, Burlington & Quincy Railroad Company, a corporation, and have

occupied that position in the State of Nebraska for over thirty years; that I have read the foregoing Petition in Equity and know the contents thereof, and that the statements and allegations therein contained are true, except as to those made on information and belief, and those I believe to be true.

R. D. POLLARD,

Subscribed and sworn to before me this 29th day of October, 1923.

CHARLES M. FIXA,
Notary Public.

(SEAL)

NOTICE.

(Title Omitted)

You and each of you as defendants in the above entitled action are hereby notified that the Chicago, Burlington & Quincy Railroad Company on the 31st day of October, 1923, filed its Bill of Complaint in the United States District Court for the District of Nebraska, Omaha Division, against you and each of you, the object and purpose of said Bill is to have declared invalid the 1923 assessment by the State Board of Equalization and Assessment in the State of Nebraska of complainant's property within said state, and to have adjudged that all of said tax in excess of 60% thereof is null and void and that you and each of you be temporarily enjoined during the pendency of this action from collecting or attempting to collect any part of the 40% of the tax thus alleged to be illegal, excessive and unjust until the further order of this Court.

You are further notified that on the 21st day of November, 1923, at the hour of 9 A. M. o'clock, or so soon thereafter as plaintiff can be heard, it will ask the Court

to issue a temporary injunction against you and each of you restraining you from collecting any part of said taxes in excess of sixty per cent thereof. Said hearing will be in the Federal Building in the City of Omaha, Nebraska.

The plaintiff will submit in support of its application the petition in this case duly verified and evidence by way of affidavit and certified copies of records now on file in said court in this case, all of which will be open for your inspection.

You will take due notice and govern yourselves accordingly.

CHICAGO, BURLINGTON & QUINCY RAILROAD CO.

By BYRON CLARK,
J. L. BOOT,
J. W. WEINGARTEN AND
C. W. KROHL,
Its Attorneys.

ANSWER.

(Title Omitted)

Come now the defendants for answer to the petition of plaintiff allege:

I.

Admit that plaintiff is a corporation organized and existing under the laws of the State of Illinois having its principal place of business in the City of Chicago in the said state, is a resident and citizen of the State of Illinois, organized for the purpose of transacting the business of a common carrier of passengers and freight by rail in Illinois,

Iowa, Nebraska and other states and that it owns and operates, as such carrier, lines of railroad in said states and other states and is engaged in interstate commerce.

II.

Admit that the defendant, William H. Smith, was the duly appointed, qualified, acting tax commissioner of the State of Nebraska at the time of the filing of this suit and that he was a resident and citizen of said state, that the persons named as treasurers of the several counties are such respective officers duly elected and qualified as alleged in the petition and are all named as defendants herein. Allege that Thomas E. Williams is now the duly appointed, qualified and acting Tax Commissioner of the State of Nebraska having succeeded William H. Smith on January 12, 1925; that he is also a resident and citizen of the State of Nebraska.

III.

Admit that this is a suit of a civil nature involving an amount in excess of $3,000.00 exclusive of interest and costs as to each defendant except Joseph Sedlacek, treasurer of Colfax County, Irene Lamma, treasurer of Dawson County, Frank N. Smith, treasurer of Garfield County, Thomas Birchall, treasurer of Hayes County, Wm. L. Boettcher, treasurer of Platte County, and John W. Fillman, treasurer of Polk County as to each of whom this action does not involve $3,000.00 but involves considerably less than $3,000.00, that each and all of the defendants are residents and citizens of the State of Nebraska.

IV.

The defendants deny that the claim and causes of action alleged by plaintiff in this suit arise under or involve the

construction or application of any of the provisions of the Constitution of the United States.

V.

The defendants deny that the taxes which have been levied against the property of the plaintiff are illegal; deny that the property of the plaintiff has been valued for taxing purposes at more than its true value and allege that it has not been assessed and valued at its full and true value but that it has been assessed and valued at not to exceed 75 per cent of its full and true value; deny that the property of all other tax payers in the state has been valued at not to exceed 60 per cent of its true value but allege that it has been assessed and valued at upwards of 82 per cent of its true value, that is, at upwards of 82 per cent of its actual value in the market in the ordinary course of trade; deny that real estate within the State of Nebraska has been valued at not to exceed 60 per cent of its true value but allege that all real estate in Nebraska has been assessed and valued at upwards of 82 per cent of its full and true value, that it, at upwards of 82 per cent of its actual value in the market in the ordinary course of trade; deny that the assessment of other property has resulted in a discrimination against the plaintiff; deny that there is any discrimination in the assessment and taxation of plaintiff's property but allege that plaintiff's property has not been assessed at a greater proportion of its true market value than has other property been assessed relative to true market value in the State of Nebraska and that plaintiff has not suffered any loss or damage by reason of its assessment and has not been called on to pay a larger proportion of the taxes, considering the amount and value of its property, than have other property owners within said state. Deny that plaintiff has been denied the equal

protection of the law and deny that there has been any violation of the Constitution of the United States or of the Constitution of the State of Nebraska or of any Act of Congress of the United States in the assessment and taxation of plaintiff's property.

VI.

Admit the passing of the enabling act by Congress as alleged by plaintiff and that it contains the provision quoted in the petition; also that the Constitution of the State of Nebraska adopted in 1866 contained the provision quoted in the petition and that such constitutional provision is now in full force and effect; admit that there are approximately 6,231.61 (erroneously stated as 6,457.9) miles of railway owned and operated by the various railroad companies in the State of Nebraska, that only 798.12 miles therein are owned by Nebraska corporations; that of such mileage the plaintiff owns and operates 2,861.42 miles; that all of the mileage above 798.12 miles is owned and operated by non-residents of the State of Nebraska; that a large part of the property of the carriers consists of real estate and its appurtenances.

VII.

Admit the correctness of the quotation of Section 1 of Article VIII, Section 4 of Article VIII, Section 28 of Article IV of the Constitution of the State of Nebraska in the plaintiff's petition; also that Sections 5820, 5822, 5823, 5825, 5827, 5829, 5830, 5839, 5840, 5841, 5842 in part, 5844-5850, 5901, 5904, 5905 and 5996, Compiled Statutes 1922, are substantially quoted, and that the statements concerning Sections 5821, 5843, and 5997-6017, Compiled Statutes 1922, are correct summaries of such sections.

VIII.

Admit that plaintiff, in accordance with the Statutes of Nebraska, made a report to the State Board of Equalization and Assessment and to the county assessors of the various counties in the state into or through which its lines of railway were constructed and operated; that in prior years plaintiff complained to said board alleging over-valuation of its property and under-valuation of all other property except railroad property; that on the 15th day of June, 1923, the State Board of Equalization and Assessment fixed the value of plaintiff's property, assessable by said board, for taxing purposes, at $137,589,782 on a basis of 2,861.6 miles of single track; and that the order is substantially as set forth in the plaintiff's petition. Deny that the defendants used the formula set forth in paragraph VIII of the petition to arrive at the value of the plaintiff's property for the year 1923; and allege that the assessment of plaintiff's property was arrived at by said board without reference to any formula but upon full consideration of all the evidence before it; and specifically deny that there was any intention or purpose upon the part of the board to refuse consideration of any proper evidence before it; but allege that it considered all of the evidence offered by the plaintiff including corrections as to its statement of earnings in the year 1921. Deny that the Statutes of Nebraska do not provide any proceedings by which the decision of the State Board may be reviewed or the assessment of said property equalized with the assessment of other property within the state or any subdivision thereof; deny that there is not provision to review said decision by an error proceeding but allege that Sections 5875 and 5876 provide for equalization and that Section 5901 of the Compiled Statutes of Nebraska, 1922, fully provides for the review on error

of the decision of the State Board of Equalization and Assessment by the Supreme Court of the State of Nebraska, and that other sections of the statutes provide fully for the procedure to obtain a review upon error.

IX.

The defendants admit that the plaintiff represented to the State Board of Equalization and Assessment that the assessing officers and boards in the several counties had assessed all other property at not to exceed 60 per cent of its actual value; but defendants deny that other property was assessed at only 60 per cent of its actual value and allege that it was assessed at upwards of 82 per cent of its actual market value in the ordinary course of trade, and further deny that there is any inequality in the assessment of plaintiff's property as compared with other classes of property in Nebraska; deny that the plaintiff's property was assessed at upwards of 122 per cent of its actual value and allege that the assessment thereof, to-wit: $137,589,782 does not exceed 75 per cent of the actual value of the plaintiff's property in the said state; deny that other property in Nebraska was assessed at not to exceed 60 per cent of its actual value but allege that all other property was assessed at upwards of 82 per cent of its actual and fair market value in the ordinary course of trade.

X.

Admit that the board on August 2, 1923, certified said levy and the result of its equalization to each of the respective county clerks of Nebraska to be spread upon the tax records of the respective counties and upon which taxes should be levied and collected; that the decision of the board so certified became the basis of the taxes that were levied, which became due November 1, 1923, and de-

linquent December 1, 1923, and that the tax lists were duly transmitted by the several county clerks to the respective county treasurers for the purpose of collecting such taxes; that a portion of Section 5996, and Sections 6017, 6020, Compiled Statutes 1922, and Section IV of Article VIII of the Constitution of the State of Nebraska are correctly quoted by plaintiff; that Section 6010 of said statutes makes it incumbent to issue distress warrants for the collection of unpaid taxes on February 1, following the year in which they are assessed; that all taxes levied upon railroad property shall be considered as taxes levied upon personal property; that there is no statutory authority in Nebraska for the payment under protest of less than 100 per cent of the taxes levied against any tax payer. Defendants allege that the plaintiff has full power to obtain full, adequate and complete relief from any alleged discrimination by an error proceeding to the Supreme Court of the state. Defendants deny that there is no administrative remedy for the wrongs alleged by plaintiff, but allege that it might have instituted an error proceeding in the Supreme Court of the State of Nebraska where, if it had sustained its position, the assessment would have been set aside and the matter remanded to the State Board of Equalization and Assessment for further action.

XI.

The defendants admit that the value of lands and improvements in Nebraska as fixed by the State Board of Equalization and Assessment are as stated in paragraph XI of the petition, that for the year 1920 lands and improvements were assessed at 68 per cent of their actual value. They particularly deny that for the year 1921 the total assessment was only 53 per cent of its actual value, that for the year 1922 it was only 62 per cent of its actual

value and that for the year 1923 it was only 54 per cent of its actual value; but allege that during each and every one of said years the total value of land and improvement in Nebraska as fixed by the State Board of Equalization and Assessment was upwards of 82 per cent of its actual and true market value in the ordinary course of trade.

Defendants deny that the value of $100,000,000, as claimed by plaintiff for its property, for the years 1920, 1921 and 1922, and $112,216,231 as claimed by it for 1923 are correct but allege that the value of plaintiff's property in each of said years far exceeded said amount, the actual value for 1923 being in excess of the amount found by the State Board of Equalization, $137,589,782, which is not to exceed 75 per cent of the actual and fair market value of plaintiff's property in Nebraska in said year. Defendants deny that lands and other property in the State of Nebraska paid taxes on not to exceed 53 per cent of the actual and true market value thereof in the year 1921 and on not to exceed 62 per cent of such value in the year 1922 and not to exceed 54 per cent thereof in the year 1923, but allege that in 1920 said property paid taxes on 68 per cent of its value and in each of said years, 1921, 1922 and 1923 the assessed value of land has been upwards of 82 per cent of its actual and true market value. Deny that if the assessment of the plaintiff is permitted to stand, as now made, plaintiff will be required to pay taxes on 122 plus per cent of its actual value but allege that it will not pay on an assessment in excess of 75 per cent of its actual value.

XII.

Admit that the names of the several counties through which plaintiff's road runs and the respective amounts of tax levied for the year 1923 are correctly stated but they deny that any part of said taxes was illegal. Admit

that plaintiff owns property in each of said counties subject to execution in excess of the amount of the taxes levied therein.

XIII.

Deny that any of the property of the plaintiff not subject to taxation by the State Board of Equalization and Assessment was included in its assessment; and particularly deny that the headquarters' building in Omaha, the shops at Plattsmouth, the shops at McCook, and the shops at Havelock were included; and deny that any non-carrier property was included in the assessment for the year 1923 or for any prior year; and deny that there should be allowed any deduction from the assessed value of plaintiff's property.

And further answering, defendants allege that Section 5482, Compiled Statutes for 1922, provides:

> "The returns of railroad companies or corporations shall not be held to be conclusive as to the value of the property, but the state board of equalization and assessment shall, from all the information which it is able to obtain, including records of the railway commission or other regulatory body, find the true value of all such property, including tangible property and franchises, and shall assess the same on the same basis as other property is hereby required to be assessed. The valuation of each mile shall be determined by dividing the whole value by the number of miles of the main track of each road or line."

Acting under said section, the State Board of Equalization and Assessment had before it for consideration the several reports and statements of the plaintiff mentioned below.

On December 31, 1922, the plaintiff had, as it reported to the Interstate Commerce Commission and to the Ne-

braska State Railway Commission, an investment in road and equipment of $535,131,810.21 and on said date it also had other physical assets consisting of materials and supplies of $15,503,525.44 making a total of $550,635,335.65. That in addition to said amount, the plaintiff had a large amount of cash on hand, a considerable portion of which was in the State of Nebraska, that the amounts invested in road and equipment and in materials and supplies were, as these defendants are informed and believe, considerably larger on March 31, 1923, than on December 31, 1922; that divided on an all track mileage basis the value assignable to Nebraska is considerably in excess of one hundred and fifty million dollars. This computation is without allowance for depreciation and without any additions for increased land values or increased unit costs or any additions for going concern value or other intangible value.

And further answering, the defendants allege that in numerous instances the plaintiff has claimed, before regulatory bodies, a value that fully justifies the assessment for 1923. In 1909 the legislature of Nebraska enacted a statute to authorize the Nebraska State Railway Commission to make a physical valuation of all railroads in the State of Nebraska. Said act is contained in Sections 704 to 713 inclusive, Compiled Statutes of Nebraska for 1922. Section 709 provides as follows:

> "The state railway commission is authorized and empowered to call on any railroad or public service corporation in this state for any information necessary in making a physical valuation of their property, and it shall be the duty of all such companies or corporations to furnish the commission with such information, sworn to by its proper officers, as the railway commission shall require. The information shall be furnished in the manner and within the time prescribed by said railway commission."

Pursuant to said section the plaintiff prepared and presented a sworn statement to the Nebraska State Railway Commission giving the reproduction value of its property as of July 1, 1909. A copy of a portion of the tabulated sworn statement furnished by plaintiff to the Nebraska State Railway Commission is as follows:

PHYSICAL VALUE FOR JULY 1, 1909, OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY'S PROPERTY.

Miles of roadway 2,850.34. Miles of track 3,478.96.

	Subject	Respondent's Valuation Repro. New
1.	Right of Way and Station Grounds	$ 25,177,999.71
2.	Real Estate	292,985.12
3.	Grading	21,196,163.23
4.	Tunnels	64,225.88
5.	Bridges, Trestles & Culverts	7,729,268.21
6.	Ties	6,190,856.52
7.	Rails	10,135,371.60
8.	Frogs and Switches	332,174.98
9.	Track Fastenings and other Material	1,931,202.33
10.	Ballast	4,077,295.65
11.	Track Laying and Surfacing	4,333,545.73
12.	Roadway Tools	64,059.05
13.	Fencing—Right of Way	761,136.49
14.	Crossings & Signs	460,331.76
15.	Interlocking and other Signal Apparatus	150,275.35
16.	Telegraph and Telephone Lines	687,410.04
17.	Station Bldgs. and Fixtures	1,813,949.32
18.	General Office Bldgs. and Fixtures	144,735.63
19.	Shops, Engine Houses and Turntables	1,287,573.62
20.	Shop Machinery and Tools	482,459.35
21.	Water Stations	764,970.17
22.	Fuel Stations	254,395.32

23.	Grain Elevators	10,000.00
26.	Electric Light Plants	151,332.00
30.	Miscellaneous Structures	1,152,332.47
31.	Adaptation and Solidification of Roadway	7,354,507.08
32.	Engineering and Superintendence	3,882,640.31
33.	Steam Locomotives	4,670,050.00
35.	Passenger Cars	2,150,998.63
36.	Freight Cars	8,589,101.80
37.	Work and Misc. Equip.	462,340.00
38.	Rent and repairs of Equip, during Const.	953,525.56
39.	Inspection and Purchase of Equip.	158,724.90
40.	Transportation of Men and Material.	13,522,037.69
41.	Stores and Supplies for Nebraska.	1,563,721.30
42.	General Expenditures—Contingencies.	67,670,879.99
	Grand Total	$200,624,576.79

If the value of the equipment and the value of the material and supplies are deducted, there remains $182,076,114.60.

Between 1909 and December 1921, additions and betterments to roadway and structures were made on the Nebraska property aggregating about $14,388,405.11. The amount of equipment on December 31, 1921, properly apportionable to Nebraska on a car mileage basis amounted to $21,216,505.56. In 1922 additions and betterments were made to road and equipment amounting to $19,371, 342.32, for the system, which apportioned on a car mileage basis for equipment and on all track mileage basis for roadway and structures assigns to Nebraska upwards of five million dollars thereof. Aggregating the several amounts to-wit: $182,076,114.60, being the amount reported by the company in 1909, less equipment and materials and sup-

plies on hand in 1909; plus $14,388,405.11 additions and betterments to roadway and structures in Nebraska between 1909 and 1921; $21,216,505.55 for Nebraska's portion of equipment in 1921, the proper apportionment for additions and betterments for 1921 and adding thereto 5 per cent for going concern value and working capital gives a total investment of upwards of $222,000,000 for the Nebraska property.

Defendants allege that plaintiff's property in Nebraska is in excellent condition and at the present time it is in, at least, 80 per cent condition. The figures above shown do not include any intangible values except as stated in the plaintiff's return in 1909 nor do they include any increase in value due to increased unit costs.

And further answering, these defendants allege that in the year 1921 the plaintiff filed its application, Finance Docket No. 1069, with the Interstate Commerce Commission to issue a large amount of securities to-wit: $60,000,000 in stock and $109,000,000 first and refunding mortgage bonds. Contained in the application addressed to the Interstate Commerce Commission for such purpose appears the following language:

> "Applicant is a railroad corporation subject to the general railroad act of Illinois and owns and operates a system of railroads extending from Chicago westerly to St. Louis, Kansas City, Omaha, Denver, Billings, St. Paul and Minneapolis, of an aggregate operated mileage of about 9,372 miles. Its railroads extend through the highly developed agricultural and manufacturing states of Illinois, Wisconsin, Iowa, Missouri, Nebraska and Colorado, and the agricultural, stock raising and mining states of Wyoming, South Dakota and Montana, with many branches and feeders. Its system also taps the extensive coal fields of southern Illinois, which furnish a very large

tonnage. It has extensive and valuable terminals in the cities of Chicago, St. Louis, Kansas City, Omaha, Denver and St. Paul, and has a very large and well established interchange of traffic with its connections. The property investment of applicant (December 31, 1919) in road and equipment was $492,716,639.10, with a total property investment of $535,210,890.33. On that date it had a corporate surplus of $241,781,197. Depreciation on its equipment at a rate unusually high as compared with other railroads, including the period of federal control, has been charged to the amount of $45,514,239.62."

During the period of federal control from December, 1918, to March 1, 1920, a standard contract existed between the Director General of Railroads and the plaintiff. The contract was dated October 8, 1918, and provided for an annual compensation during federal control of $33,390,080 including compensation for its subsidiary, Quincy, Omaha and Kansas City Railroad Company, which amount was increased by negotiation with the Interstate Commerce Commission to $33,879,101.01 of which sum $33,841,542 applied to the Chicago, Burlington and Quincy (the remainder to its said subsidiary). Said sum of $33,841.542 capitalized at 5¾ per cent represents a value of $588,548,556. The plaintiff further accepted the government guaranty for the six months period ending August 31, 1920 as provided by Transportation Act 1920.

And further answering, the defendants allege that in a proceeding before the Interstate Commerce Commission entitled Increased Rates 1920, and generally known as *Ex parte* 74, the plaintiff claimed as a basis for earning a property investment for the system of $516,256,404. This amount does not make any reduction for depreciation, nor does it add anything for going concern value or other intangible value or for increased unit costs.

In each of the years 1922 and 1923 the Board of Equalization and Assessment has had before it and has considered the reports of the plaintiff to the Nebraska State Railway Commission and has taken the same into consideration in arriving at the assessed value of the plaintiff's property for taxation.

The defendants particularly deny that at any time during the past fifteen years the property of the plaintiff has been overvalued for purposes of taxation; deny that there has been any scheme or conspiracy on the part of members of the State Board and of their predecessors in office to over-value the property of the plaintiff or to under-value the property of others; deny that the various local assessors have ever entered into any scheme or conspiracy either to over-value the property of plaintiff or to under-value the property of others; deny that there has ever been any intent either on the part of the State Board of Equalization and their predecessors in office or on the part of the local assessors to over-value the property of the plaintiff or to under-value the property of others or to under-value classes of other property.

The defendants allege that so far from being unduly increased the assessed valuation of plaintiff's property has not been increased in proportion to the actual increased value thereof.

Following is a table showing reproduction value of plaintiff's property for the years 1909-1922 inclusive as claimed by plaintiff in the physical valuation before the Nebraska State Railway Commission with additions and betterments 1910-1922 inclusive, such additions and betterments apportioned on all track mileage ratio between Nebraska and the system. No deduction is made for depreciation. The property of the plaintiff was in good

operating condition in each one of said years. The table also shows the assessed value for each of said years:

	1909 claimed value with additions and betterments	Assessed value
1909, July 1	$200,624,576.79	$119,290,055.00
1910, June 30	203,219,179.52	119,450,615.00
1911, June 30	207,787,931.92	119,441,865.00
1912, June 30	210,749,317.21	119,441,865.00
1913, June 30	214,729,862.79	119,441,865.00
1914, June 30	220,039,832.73	119,441,865.00
1915, June 30	222,121,978.61	119,441,865.00
1916, June 30	223,780,450.31	121,934,740.00
1916, Dec. 31	225,427,503.52	
1917, Dec. 31	230,916,815.95	121,932,625.00
1918, Dec. 31	234,331,717.37	121,978,640.00
1919, Dec. 31	236,230,976.65	122,015,515.00
1920, Dec. 31	240,270,513,43	131,765,605.00
1921, Dec. 31	242,553,104.85	131,639,875.00
1922, Dec. 31	247,839,544.16	137,589,782.00

The assessed values in Nebraska from 1911 to 1920 inclusive were on the basis of 20 per cent of actual value; hence in order to make the foregoing table uniform, the assessed valuations for those years were multiplied by five. Table showing assessed values of all railroads in Nebraska, 1909 to 1922, inclusive, compared with total assessed value of all property:

1909	$ 54,546,365.08	$ 398,985,819.00
1910	54,814,350.60	412,138,607.00
1911	54,806,915.00	415,670,075.00
1912	55,050,286.00	463,371,889.00
1913	55,829,328.00	470,690,414.00
1914	55,945,074.00	471,940,195.00
1915	55,945,067.00	481,931,238.00

1916.....	55,833,234.00	500,827,274.00
1917.....	56,855,453.00	528,891,424.00
1918.....	56,827,782.00	567,947,914.00
1919.....	56,831,076.00	568,921,570.00
1920.....	60,851,333.00	762,284,909.00
1921.....(	307,120,316.00	3,305,426,978.00
1922....Actual value(	315,629,880.00	3,191,747,870.00

XIV.

Admit that for many years farm lands in the State of Nebraska have been valued for taxation at less than the true value; that in the year 1920 farm lands were valued at about 68 per cent of the true value thereof; deny that improvements on real estate have ever been omitted from assessment; deny that improvements upon real estate are assessed at only a fraction of their actual value; deny that improvements upon real estate have been valued at not to exceed ten to twenty-five per cent of their actual value; and allege that they are and since 1921 have been each year assessed at upwards of 82 per cent of their actual and fair market value; deny that farm lands in the State of Nebraska were assessed at only 53 per cent of their true value in 1921; deny that for the year 1922 they were assessed at only 62 per cent of their true value; deny that for the year 1923 they were assessed at only 54 per cent of their true value; but allege that in each of the years 1921, 1922 and 1923 farm lands were assessed at upwards of 82 per cent of their true and fair market value and that in each of said years real estate generally was assessed fully as high. They deny that the undervaluation of farm lands was for the purpose of relieving them of their just share of burdens of the state. They admit that in the year 1920 W. H. Osborne, then Secretary of the State Board of Equalization and Assessment, published a statement, a portion of which is set

forth in the petition, that a resolution was adopted at the state assessors' meeting in 1921 substantially as set forth in paragraph XIV of the petition and that said Osborne issued a further statement which is in part set forth in the petition. These defendants specifically deny that the county assessors assessed farm land in Nebraska for the year 1921 at only 53 per cent of its true and actual fair market value but allege that in said year they assessed it at upwards of 82 per cent of its true and actual fair market value, and deny that real property was equalized so that it was assessed at only 53 per cent of its value but allege that as equalized it was assessed at upwards of 82 per cent of its true and actual value in the market in the ordinary course of trade in the year 1921. The defendants further admit that in the year 1922 said Osborne issued the statement copied on page 39 of the petition but deny that the purpose or intent of such statement was to encourage precinct assessors further to reduce the value of real estate for taxing purposes or that it was intended to induce them to undervalue farm lands for the purpose of taxation, and allege that the meaning and effect of said statement were to encourage the several assessors to perform their duties as required by law.

Defendants deny that in the year 1923 or in any prior years there was any scheme or conspiracy of any kind to undervalue any species of property in Nebraska for the purpose of placing an undue burden of taxation on plaintiff or on any other tax payer or group of tax payers and allege that property was not under-valued except as heretofore stated and they allege that the railroads have been and now are as greatly under-valued as any other form of property and that the assessment of the property of the plaintiff for the year 1923 is not on a higher basis than

the assessment of other forms of property in Nebraska for the same year.

XV.

The defendants admit that proper abstracts of the assessment rolls were prepared by the several county assessors and forwarded to the State Board of Equalization and Assessment; that the State Board of Equalization and Assessment met in July, 1923, and examined the abstracts and properly equalized the assessments in the several counties and that the assessments of all species of property were duly equalized; that the total value of farm lands and improvements in 1922 was $1,753,312,309 and in 1923 was the sum of $1,787,276,553.

Defendants deny that for the year 1922 the actual value of all taxable lands and improvements thereon in the State of Nebraska was $2,697,403,551 or $58.10 per acre but allege that the total value was not in excess of $2,191,640,385 and that the average fair and actual market value of farm land with improvements was not to exceed the sum of $46 per acre for the year 1922; deny that for the year 1923 the aggregate value of said property was $3,309,771,392 and deny that the average fair market value of farm lands in Nebraska was $72.77 per acre but allege that the aggregate value thereof did not exceed $2,234,095,690 and that they did not exceed $48.05 per acre.

Defendants admit that said abstracts as equalized showed the aggregate assessed value of all town lots with improvements in 1922 was $539,730,785 and for 1923 $556,433,856. Deny that for the year 1922 the actual and true market value thereof was $830,355,053 but allege that the actual and fair market value thereof did not exceed $674,663,480; deny that for the year 1923 the actual and

true market value thereof was $1,030,433,066 but allege that the actual and fair market value thereof did not exceed $695,542,320. Defendants admit that the aggregate assessed value of all personal property other than property subject to assessment by the State Board of Equalization and Assessment in Nebraska for 1922 was $531,245,186. They deny that the actual fair and true market value thereof was $817,300,286 but allege that the actual value thereof in said year did not exceed $664,056,480.

Admit that for the year 1923 the assessed value of all personal property other than property assessed by the State Board of Equalization and Assessment in the State of Nebraska was $538,305,628 (instead of $539,277,965 as alleged by plaintiff) and deny that the actual value of all such property in the state for the year 1923 in the market in the ordinary course of trade was $998,662,898 but allege that the actual and fair market value thereof did not exceed $672,882,035. Defendants deny that the assessed value of taxable land upon which to compute taxes under the laws of the State of Nebraska did not represent to exceed 65 per cent of the real value of said land in the market in the ordinary course of trade and of the reasonable value thereof in the year 1922. Deny that the assessed value thereof did not exceed 54 per cent of the value of taxable lands for the year 1923 in the ordinary course of trade, and allege that in each of said years the assessed value of lands in Nebraska was upwards of 82 per cent of the actual and fair market value thereof in the ordinary course of trade. Defendants admit that taxable lands in the State of Nebraska constitute somewhat over 55 per cent of the total assessed value of the State of Nebraska and constitute approximately 61 per cent of the taxable property in Nebraska exclusive of railroads.

Defendants deny that the value of plaintiff's property subject to assessment by the State Board of Equalization and Assessment under the laws of the State of Nebraska for the years 1920, 1921 and 1922 did not exceed $100,000,000 and deny that in 1923 it did not exceed $112,216,231 but allege that in each and every one of said years its value far exceeded the amount of its assessment as follows: In the year 1920 the actual value of plaintiff's property was in excess of $164,694,570, in the year 1921 the actual value of plaintiff's property was in excess of $164,694,655, in the year 1922 the actual value of plaintiff's property was in excess of $171,987,230 and in 1923 the actual value of plaintiff's property was in excess of $171,987,230. Defendants admit that plaintiff owns and operates 2,861.42 miles of railroad in the State of Nebraska. They deny that the value thereof does not exceed $39,300 per mile and allege that its actual and fair value exceeded, on April 1, 1923, the sum of $60,023.10 per mile on the average in Nebraska. They specifically deny that in comparison with other property plaintiff's property should not be assessed in excess of $23,580 per mile or an aggregate of $67,476,528 in the State of Nebraska and allege that its fair assessable value in comparison with all property in the State of Nebraska is not less than the amount assessed by the State Board of Equalization and Assessment, to-wit: $137,589,782. Defendants deny that there has been any habitual, intentional or systematic underassessment of any species of property in Nebraska except as hereinbefore stated. They allege that railroad property generally, including property of the plaintiff, has been underassessed to as great an extent as other forms of property have been underassessed. They particularly deny that plaintiff's property was assessed at 122 plus per cent of its actual value and allege that for the year

1923 it was not assessed to exceed 75 per cent of its actual and fair market value.

XVI.

Defendants deny that there has been any intentional or prearranged plan on the part of the several county assessors and county boards of equalization to undervalue farm lands and other property in Nebraska other than railroads while at the same time the property of the plaintiff was valued at more than 100 per cent of its true value; deny that there has been any plan to undervalue farms and other property in Nebraska as compared with railroads or as compared with plaintiff's property; deny that there is any discrimination against the plaintiff; deny that plaintiff bears more than its just proportion of the burden of taxation in the State of Nebraska; deny that the methods of assessment adopted by the taxing authorities in the State of Nebraska in assessing all property at something less than its actual and fair value operates unjustly against the plaintiff or causes any discrimination against the plaintiff or denies the plaintiff equal protection of the law, or deprives plaintiff of its protection without due process of law, or takes its property for public use without compensation but allege that plaintiff's property is honestly and fairly assessed in comparison with all other forms of property, that plaintiff is not discriminated against in any respect in regard to its taxation and that it bears no more than its fair share of the burden of the taxes in the State of Nebraska.

XVII.

The defendants deny that the assessment of taxes as above set forth causes any unjust or intentional discrimination against interstate commerce or places any burden upon the instrumentalities of interstate commerce

as compared with that placed on other property in the State of Nebraska and deny that the taxes assessed and collected against the plaintiff in the State of Nebraska constitute an unlawful burden upon interstate commerce.

XVIII.

The defendants specifically deny that farm property or farm lands within the State of Nebraska are assessed at only 54 per cent of the true and actual value thereof but allege that they are assessed at upwards of 82 per cent of the true and actual value thereof and deny that the plaintiff's property is assessed at more than its actual value, but allege that, on the contrary, it is assessed at not to exceed 75 per cent of its true and actual value; deny that the plaintiff is denied the equal protection of the law.

XIX.

The defendants admit that the taxes levied on the plaintiff's property constitute a lien thereon as taxes constitute a lien upon all property in the State of Nebraska. Deny that the plaintiff is in any wise injured thereby or unjustly treated thereby or that plaintiff will receive any different or more exacting treatment than any other tax payer in the State of Nebraska. Plaintiff denies that the assessment of the plaintiff's property at $137,589,782 is in violation of any provision of law or any provision of the Constitution of the United States or of any provision of the Constitution or laws of the State of Nebraska; deny that the plaintiff does not receive the equal protection of the law; deny that the plaintiff is subjected to any burdens different from or greater than imposed upon other property owners and tax payers in the State of Nebraska; deny that the action of the State Board of Equalization and Assessment in making the assessment

of plaintiff's property is interfering with interstate commerce but allege that in all respects the assessment is legal, valid and just and that the taxes assessed against plaintiff's property are in all respects fair and just.

Wherefore defendants pray that the petition of the plaintiff may be dismissed, that they may go hence without day and that they may recover their costs herein expended and have such other and further relief that may be just and equitable.

O. S. SPILLMAN, Attorney General,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Defendants.

APPLICATION FOR APPOINTMENT OF A SPECIAL MASTER.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA OMAHA DIVISION.

In Equity No. 628.

Chicago, Burlington & Quincy Railroad Company, a Corporation, Plaintiff,

vs.

William H. Smith, as Tax Commissioner of the State of Nebraska, et al., Defendants.

Comes now the plaintiff in the above entitled action and moves the court that there be appointed by the court a special master to take the evidence and to make therefrom and report to this court his findings of fact and conclusions of law upon the issues joined between the parties under the pleadings herein, such findings of fact and conclusions of law not to be conclusive upon the parties but only advisory to the court and for the purpose of aiding

the court in its hearing and final decision herein, for the reason that the hearing of this action will involve the taking of testimony as to property valuations throughout the State of Nebraska and will be accompanied by a great amount of detail and examination of records and will require the testimony of many witnesses and the taking of the evidence on the issues will consume more time than this or any court can devote to the matter consistent with the discharge of the regular duties of the court and the judges thereof and there is presented herein an exceptional condition requiring the appointment of a special master.

CHICAGO, BURLINGTON & QUINCY RAILROAD CO.

By BYRON CLARK,
JESSE L. ROOT,
J. W. WEINGARTEN,
C. W. KROHL,
Its Attorneys.

Endorsed: Filed June 13, 1925,
R. C. Hoyt, Clerk.

ORDER

In Equity No. 628

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION.

Chicago, Burlington & Quincy Railroad Company, a Corporation, Plaintiff,

VS.

Thomas E. Williams, as Tax Commissioner of the State of Nebraska, Substituted for William H. Smith, Formerly Tax Commissioner of the State of Nebraska, et al, Defendants.

Now on this 23rd day of June, 1925, this cause came on for hearing before the Honorable Wm. S. Kenyon, Circuit Judge, and the Honorable Thomas C. Munger and Honorable Joseph W. Woodrough, District Judges, on the motion of the plaintiff for the appointment of a special master and the court finds from an examination of the issues joined between the parties that the final hearing and determination of this cause requires the taking of testimony as to property valuations throughout the State of Nebraska, will require the testimony of many witnesses and an examination of many records and will consume more time than this court can devote to the matter consistent with the discharge of the regular duties of this court and the individual judges thereof, and there is presented an exceptional condition requiring the appointment of a special master; and the court finds that a special master should be appointed to take the evidence and to make therefrom and report to his court his findings of fact and conclusions of law touching the issues joined between the parties, such report not to be conclusive upon the parties but only advisory and for the purpose of aiding the court in its hearing and determination in this cause.

It is therefore ordered that the Honorable B. H. Dunham of Omaha, Nebraska, within the District of Nebraska, be and he is hereby appointed special master in this case and as such is authorized and directed to hear and take the evidence of the parties and to make therefrom and report to this court his findings of fact and conclusions of law thereon touching the issues joined between the parties under the pleadings in this cause. Such findings of fact and conclusions of law shall not be conclusive upon the parties or the court but shall be only advisory to the court and shall be only for the purpose of aiding the court in its final hearing and determination of this cause.

Said master is authorized to employ competent stenographic assistance to take and transcribe the evidence and to do all things necessary in compliance with this order and shall file with his findings and conclusions a record of the evidence so taken for the information and service of the court. Said master shall sit at such times and place within or without the State of Nebraska as he may determine or as the parties may agree, notwithstanding the provisions of Rule 59.

WM. S. KENYON,
United States Circuit Judge.
THOS. C. MUNGER,
United States District Judge.
J. W. WOODROUGH,
United States District Judge.

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ORIGINAL No. 16

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

IN THE MATTER OF:

THOS. E. WILLIAMS, Tax Commissioner of the State of Nebraska, et al,

Petitioners,

VS.

JOSEPH W. WOODROUGH, District Judge of the United States District Court for the District of Nebraska,

Respondent.

RETURN OF JOSEPH W. WOODROUGH, DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA.

JOSEPH W. WOODROUGH,
District Judge, Appearing for Himself.

THE COCKLE PRINTING CO., LAW BRIEFS, OMAHA, NEB.



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ORIGINAL No. 16

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

IN THE MATTER OF:

THOS. E. WILLIAMS, Tax Commissioner of the State of Nebraska, et al,

Petitioners,

VS.

JOSEPH W. WOODROUGH, District Judge of the United States District Court for the District of Nebraska,

Respondent.

RETURN OF JOSEPH W. WOODROUGH, DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA.

TO THE HONORABLE WILLIAM HOWARD TAFT, CHIEF JUSTICE OF THE UNITED STATES, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The answer of Joseph W. Woodrough, Judge of the District Court of the United States for the District of Nebraska to the rule upon him to show cause why a writ

of mandamus should not issue commanding him in said court, to call to his assistance two other Federal judges, as provided for by Section 266 of the Judicial Code as amended by the Act of February 13, 1925, to hear and determine the cases herein on final hearing, respectfully answers and certifies to the Honorable Supreme Court of the United States as follows:

First, respondent believes that the Petitioners have correctly set out the matters appearing of record in the proceeding herein, so far as the said petition undertakes to relate them.

Second, respondent states that before denying the motion of the Petitioners herein that he call to his assistance two Federal judges to sit with him to rule on the exceptions to the report of the Special Master at final hearing of said cause, he examined the bill of complaint herein and concluded that the relief sought therein was that a certain valuation of plaintiff's property as fixed by the State Board of Equalization be declared null and void and that the property of the Plaintiff be discharged from the pretended lien of said valuation, and for an injunction against certain county officers, to-wit, county treasurers of seventy-one counties of the State of Nebraska, restraining and enjoining them against collecting taxes under and in accordance with a certain assessment based upon said valuation, which it was alleged was null and void because unlawful and discriminatory under the laws and constitution of the State of Nebraska (pp. 11, 12, 13, 19 and 20 appendix) and of the United States, (pp. 12 and 13 appendix).

Respondent further ascertained from an examination of said bill of complaint that the only officer of the State

of Nebraska who was designated therein as a party defendant was the Tax Commissioner of the State of Nebraska, who, under the constitution of the State of Nebraska (Section 28 of Article IV (p. 11 appendix), has jurisdiction over the administration of the revenue laws and together with the Governor, Secretary of State, State Auditor and State Treasurer, has power to review and equalize assessments of property for taxation within the State of Nebraska, and who, under the statutes of the State of Nebraska (Section 5829, Compiled Statutes of Nebraska, 1922), (p. 13 appendix) is authorized to pass upon the forms, schedules, tax books and records employed by county administrative officers and also by statute (Sections 5830, 5886, 5887, 5890, 5892 and 5899, Compiled Statutes of Nebraska, 1922, (pp. 14, 15, 16, 17, 18, 19, appendix), is required to report to the State Board of Equalization property subject to taxation improperly omitted from the tax list, but that said Tax Commissioner in no wise is charged with the duty of collecting the taxes levied by the state or county authority, and has no duties to discharge in connection therewith, so that respondent concluded that the bill of complaint failed to state a valid cause of action against said Tax Commissioners.

Third, respondent further states that in denying said motion that he call to his assistance two Federal judges to sit with him at final hearing, he gave consideration to the provisions of the statute, to-wit: Section 266 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. at L. 936, 938 (Section 380, Title 28, U. S. Code), which relate only to proceedings "restraining the action of any officer of such state in enforcement or execution of such statute, or in the enforcement or execution of

an order made by an administrative board or commission acting under and pursuant to the statutes of such state * * * * *."

Fourth, respondent, in denying said motion that he call to his assistance two additional Federal judges to sit with him to assist him in disposing of said injunction, was of the opinion that the county treasurers, defendants in said action against whom injunctive relief was prayed, were not officers of the State of Nebraska within the purview of said statute, Section 380 Title 28 U. S. Code, and that therefore the provisions of said statute of the United States did not apply in requiring the presence of three judges at final hearing in said suit in the District Court.

In arriving at these conclusions, respondent gave consideration to the following facts and authorities, among others, to-wit:

(a) That in another proceeding of a similar nature in the same court, wherein the Chicago, Burlington & Quincy Railroad Company filed a similar bill of complaint against the State Tax Commissioner and certain county treasurers of the State of Nebraska, seeking to enjoin them in the collection of certain taxes which had been assessed for the year 1927, respondent, upon application of the plaintiff therein for a temporary injunction, called to his assistance for hearing thereon, Honorable Kimbrough Stone, Judge of the Circuit Court of Appeals for the Eighth Circuit, and Honorable Thomas C. Munger, Senior District Judge of the Dis-

trict Court of the United States for the District of Nebraska, and that on November 29th, 1927, said judges and this respondent sitting in the District Court under the provisions of Section 266 of the Judicial Code, determined and concluded that there was not involved in said proceeding any injunction sought against any state officer, and that therefore the proceeding was not within the provisions of Section 266 of the Judicial Code requiring the attendance and hearing before a court of three judges, and thereupon discontinued the hearing before the three judges.

(b) That in a similar proceeding in the District Court for the Southern District of Ohio, Eastern Division, which involved facts almost identical with those here before the court, with the sole exception that no member of the Tax Commission had been joined as a party defendant, the court, consisting of Donahue, Circuit Judge, and Hough and Westenhaver, District Judges, in the case of *Connecting Gas Co. v. Imes,* 11 Fed. (2nd) 191, decided and determined that a bill of complaint, seeking injunctive relief against county treasurers of five Ohio counties to enjoin the collection by them of taxes which had been levied and assessed by the Tax Commission of Ohio, did not present a suit within the purview of Section 266 of the Judicial Code in that said county treasurers were not officers of the State of Ohio.

(c) That in a similar proceeding entitled *Cumberland Telegraph & Telephone Co. v. City of Memphis,* 198 Fed. 955, the District Court for the Western District of Tennessee, Western Division, consisting of Denison, Circuit Judge and McCall and Sanford, District Judges,

decided that a bill of complaint seeking a temporary injunction to restrain the mayor and other officers of the City of Memphis against enforcement of an ordinance of said City fixing rates to be charged by the complainant telephone company, did not present a suit within the purview of Section 266 of the Judicial Code for the reasons that the words in said section of said Judicial Code "statute of a state" were used in their ordinary sense as meaning a law directly passed by a state legislature and that the words "officer of such state" meant an officer whose authority extended throughout the state.

(d) That county treasurers are not included among the officers enumerated in the Constitution of the State of Nebraska, but are elected by the voters of their respective counties pursuant to the provisions of the statutes of the State of Nebraska, the legislature having by said constitution been given authority to "provide by law for the election of such county and township officers as may be necessary," (Constitution of Nebraska, Sections 4 and 5, Article IX, page 94, Compiled Statutes of Nebraska, 1922), (p. 12 appendix). Among the duties of county treasurers as provided by statute is that they shall "receive all money belonging to the county from whatsoever source derived and all other money which is by law directed to be paid to him." (Section 4964, Compiled Statutes of Nebraska, 1922 (p. 13 appendix). Said county treasurers are also by statute declared to "be ex-officio county collectors of all taxes levied within their respective counties" (Section 5996, Compiled Statutes of Nebraska, 1922 (p. 20 appendix). It is the duty of said county treasurers to make collection in conformity

with the tax list prepared by the county clerk (Section 5984, Compiled Statutes of Nebraska, 1922 (p. 19 appendix), which tax list is a record of all taxes levied upon property within the county, including state, county, city, village, school district and road district purposes and special assessments, and it is further provided that the county treasurer shall "report and pay over the amount of the taxes and special assessments due to towns, districts, cities, villages, corporations and persons collected by him, when demanded by the proper authorities or persons" (Section 6039, Compiled Statutes of Nebraska, 1922 (p. 20 appendix). So far as state taxes are concerned, it is provided by statute that the treasurers of the several counties "shall pay into the state treasury all funds in their hands belonging thereto on or before the 10th day of each month, and at such other time as the state treasurer shall require" (Section 6035, Compiled Statutes of Nebraska, 1922 (p. 20 appendix). Transfer of such state funds by the county treasurer to the state treasury has been held to be merely a ministerial act. *State, Ex. rel Hall vs. Ure,* 99 Nebr. 486, 490. While the bond of the county treasurer is security for the payment of state taxes to the state treasurer (Section 6042, Compiled Statutes of Nebraska, 1922 (p. 20 appendix), no duty to make such payments arises until the state auditor has furnished suitable blanks for the making of settlements. *State v. Ure,* 102 Nebr. 648, 652, 653. Under these statutes, respondent is of the opinion that the county treasurer by receiving state taxes does not thereby become a state officer any more than by receiving taxes for school districts, cities and villages, drainage districts and irrigation districts, he becomes an officer of said district, cities or villages.

(e) Respondent further submits the following decisions of courts of the several states relating to the question as to whether an officer of a county is a state officer, among such decisions being *Travis County v. Jourdan,* 91 Tex. 217, 42 S. W. 543, wherein the Supreme Court of Texas refused to issue a writ of mandamus against a county treasurer because he was held not to be an "officer of the state government," within the meaning of the statute; *State v. Dillon,* 90 Mo. 229, 2 S. W. 417, wherein a sheriff was held not to be a "state officer" within the purview of the constitution of Missouri; *Donahue v. County of Will, et al.,* 100 Ill. 94, wherein a county treasurer was held not to be a civil officer of the state so as to prevent his summary removal by the Board of Supervisors and to limit the removal to proceedings for impeachment and also *State v. Oleson,* 15 Nebr. 247, citing and relying upon the case of *Donahue v. County of Will, supra,* wherein a similar decision was made under the laws and constitution of the State of Nebraska in respect to the removal of a sheriff.

(f) Respondent further gave consideration to the purpose and intent of Congress in enacting Section 266 of the Judicial Code and more particularly in respect to the amendment of February 13, 1925, relating to the presence of three judges on final hearing. At the present time there are numerous suits in equity pending in the District Court of the United States for the District of Nebraska in respect to the collection of taxes by county treasurers for the years 1922 to 1927 inclusive. Not only is it a difficult matter for litigants to secure the presence of three judges to pass upon applications for temporary

injunctions in such cases and to determine them upon final hearing, but the direct consequence of a requirement that such matters necessitate the presence of three judges is that a direct appeal in all such cases would thereupon lie to the Supreme Court of the United States. Respondent was of the opinion that the statute, to-wit, Section 266 of the Judicial Code, does not show that Congress intended that suits of this character wherein the relief sought was against county treasurers were of such a nature as to fall within the purview of said statute.

(g) It is true that interlocutory injunctions have been issued by three Federal judges under Section 266 of the Judicial Code against defendant officials described in the reports as county officers, but as respondent is advised and believes, the question of the right of one Federal judge to grant the relief in the place of three Federal judges was not at issue or determined in any of those suits. Typical cases are:

Noble v. Douglas, 274 Fed. 672, 687. On appeal to this court, 261 U. S. 165, 170;

Fenner v. Boykin, 3 Fed. (2nd) 674, 676. On appeal to this court, 271 U. S. 240, 244;

Van-Deman & Lewis Co. v. Rast, 214 Fed. 827, 834. On appeal to this court, 240 U. S. 342, 368;

Marcus Brown Co. v. Feldman, 269 Fed. 306, 318. On appeal to this court, 256 U. S. 170, 199;

Orr v. Allen, et al, 245 Fed. 486, 488. On appeal to this court, 248 U. S. 35, 37.

And these are the causes and reasons which this respondent offers why a mandamus should not issue commanding him to call to his assistance two other Federal judges to hear and determine the questions herein at final hearing, and states that in making the rulings complained of in the petition herein, he believed and now asserts that he exercised lawful judicial discretion. But he respectfully submits to the judgment of the court and will enforce by order any direction given by the court in the premises.

JOSEPH W. WOODROUGH,

District Judge of the United States District Court for the District of Nebraska.

APPENDIX

The following sections of the Constitution of the State of Nebraska, and statutes of at state; also, sections of the Constitution of the United States, are referred to in the return:

Section 28, Article IV, Constitution of State of Nebraska, pp. 74 and 75, Comp. Stat. Neb., 1922:

> "A Tax Commissioner shall be appointed by the Governor with the advice and consent of the Senate. He shall have jurisdiction over the administration of the revenue laws of the state, and together with the Governor, Secretary of State, State Auditor, and State Treasurer shall have power to review and equalize assessments of property for taxation within the state. He shall have such other powers and perform such other duties as the Legislature may provide. His term of office and compensation shall be as provided by law."

Sections 1 and 4, Article VIII, Constitution of State of Nebraska, pp. 89 and 91, Comp. Stat., supra:

> Sec. 1. "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the Legislature."

Sec. 4. "The Legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

Sections 4 and 5, Article IX, Constitution of State of Nebraska, p. 94, Comp. Stat., supra:

Sec. 4. "The Legislature shall provide by law for the election of such county and township officers as may be necessary."

Sec. 5. "The Legislature shall provide by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine; and in any county that shall have adopted a township organization the question of continuing the same may be submitted to a vote of the electors of such county at a general election in the manner that shall be provided by law."

Section 1, of the 14th Amendment to the Constitution of the United States, p. 19 Comp. Stat., supra:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with-

out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 4964, Comp. Stat., Neb. 1922:

"It shall be the duty of the county treasurer to receive all money belonging to the county, from whatsoever source derived, and all other money which is by law directed to be paid to him. All money received by him for the use of the county shall be paid out by him only on the warrants issued by the county board according to law, except where special provision for the payment thereof is or shall be otherwise made by law."

Section 5820, supra:

"All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade."

Section 5829, supra:

"The form of all blanks, forms, schedules, books of instruction, assessment and tax books, records, and all other forms which may be necessary or expedient for the proper administration of this act, or of the revenue laws in general shall, on or before the fifteenth day of January of each year, be approved by the tax commissioner, and all such schedules, forms and documents shall be uniform throughout the several counties in so far as the same is possible and practicable. The tax commissioner shall, on or before the first day of January of each year furnish the county clerk of each county, forms for all schedules for the listing and assessment of personal property; and the county clerk of each county shall, on or before the first day of April in each year cause to be printed, a sufficient number of such schedules

for the use of the county and deliver the same to the county assessor."

Section 5830, supra:

"Whenever it shall be made to appear to the tax commissioner that any property has been improperly omitted from the tax list or assessment roll of any district or county for any year; or, if assessed, that the same has been undervalued, as compared with like property in the same county or in the state, so that the assessment for such year in such district or county is grossly unfair or inequitable whether the same has been equalized by the county board of equalization or the state board of equalization and assessment or not, he shall report the same to the State board of equalization and assessment, and said board shall examine into the facts, and shall cause to be served upon any person, company or corporation affected by such reassessment, an order to show cause why such reassessment should not be made; which order to show cause shall be served for a period of at least ten days prior to the date fixed for such hearing; and at such hearing if satisfied that it would be for the best interest of the state that a reassessment of such property be made, said board may appoint a special assessor and such deputy assessors as may be necessary to cause a reassessment to be made of all or any real and personal property, or either, in any such district or county as to them may seem proper, to the end that all property in such district or county shall be assessed equitably as compared with like property in such district, county or state: *Provided, however,* that no such action shall be taken by the tax commissioner, or others under the provisions hereof, unless the same be commenced by December first, next following the date of the original assessment: *Provided, further, however,* that no land

shall be re-assessed under the provisions of this section where the same shall have changed ownership otherwise than by will, inheritance or gift; *Provided, further,* that where an appeal has been taken from the original assessment and an adjudication thereof had by the court, such adjudication shall be final and not subject to modification by re-assessment."

Section 5886, supra:

"Every corporation organized under the laws of any other state or county transacting business in Nebraska, or offering for sale in Nebraska, any of its securities, shall, on or before the fifteenth day of April of each year, file a statement with the tax commissioner, giving the name and post office address of each person residing in Nebraska owing any of such stocks or shares together with the number of shares held by each person and the par and market values as of April first of that year."

Section 5887, supra:

"The president, cashier or other accounting officer of every bank or banking association, loan and trust or investment company, shall, on the first day of April of each year, make out a statement under oath, showing the number of shares comprising the actual capital stock of such association, bank or company; the name and residence of each stockholder, the number of shares owned by each, and the value of the shares on the first day of April, and shall deliver such statement to the proper county assessor. Such capital stock shall thereupon be listed and assessed by him at the same rate as tangible property is assessed in the taxing district where the principal place of business of such association, bank or company is located. Whenever any such bank, association or company shall have acquired real estate or other

tangible property which is assessed separately, the assessed value of such real estate or tangible property shall be deducted from the valuation of the capital stock of the association or company. *Provided,* mortgages, trust deeds, and all other liens or interest in real estate less than a fee title, and held as security for loans, shall not be considered or assessed as part of the capital stock for purposes of taxation, and shall not be deducted from the capital, surplus or undivided profits. The county assessor shall determine and settle the true value of each share of stock after an examination of such statement; and in case of a national bank an examination of the last report called for by the comptroller of the currency, and if a state bank the last report called for by the department of trade and commerce, and if the county assessor deem it necessary, he may make an examination of the officers of such bank, association or company under oath, in determining and fixing the true value of such stock, and shall take into consideration the market value of such stock, if any, and the surplus and undivided profits. Such association, bank or company shall pay the taxes assessed upon its stock and shall have a lien thereon for the same; and for purposes of assessment it shall not be permissible to deduct from the amount of the capital stock, the value of any United States government securities owned by such bank, association or company. Such taxes shall be in lieu of all other taxes on intangible property of such bank, association or company, as well as all other taxes on the stock or shares of such bank, association or company in the hands of the individual."

Section 5890, supra:

"Each and every person, association, co-partnership, joint stock company or corporation, organized

under the laws of this state or any other state or government engaged in street railways, waterworks, electric lights, gas works, natural gas, mining, express, telegraph, telephone business in the State of Nebraska, and all other like companies and like associations, or owning or operating a pipe line in the State of Nebraska, whether such line is used for the transmission of oil, heat, steam or any substance to be used for lighting, heating, power or other purpose, or for the transmission of articles by pneumatic or other power, shall, in addition to listing the tangible property owned in each governmental subdivision by such person, association, co-partnership, joint stock company or corporation, and being taxed thereon in like manner as other tangible property is taxed in the governmental subdivision, shall furnish to the local assessor and to the tax commissioner a sworn statement of the amount of the capital stock, setting forth particularly:

First. The name and location of the company;

Second. The amount of capital stock authorized, and the number of shares into which capital stock is divided;

Third. The amount of capital stock paid up;

Fourth. The market value, or if of no market value, then the actual value of the shares of stock;

Fifth. The true value of its franchise, if any, granted under and by virtue of any law of this state or ordinance of any city or village;

Sixth. The length of time such franchise was granted, together with the date of same;

Seventh. The total amount of indebtedness, except the indebtednes for current expenses, excluding from expenses the amount paid for the purchase or improvement of property;

Eighth. The amount of capital on which a dividend was declared during the last preceding year;

Ninth. The date of each dividend declared during said year, ending with the last day of the last preceding December;

Tenth. The rate per cent of each dividend declared.

Eleventh. The total amount of each dividend declared during the year ending with the last day of the last preceding December.

Twelfth. Gross earnings during said year.

Thirteenth. Net earnings during such year.

Fourteenth. Amount of surplus;

Fifteenth. Amount of profit added to sinking fund during said year;

Sixteenth. Maximum price at which shares of stock sold during said year;

Seventeenth. Minimum price at which shares of stock sold during said year;

Eighteenth. Average price at which shares of stock sold during said year."

Section 5892, supra:

"For each day's neglect or refusal to furnish such statement, the company shall forfeit the sum

of twenty-five dollars, and for each day's refusal to furnish its books for inspection, if demand therefor is made by the tax commissioner, the company shall forfeit the sum of twenty-five dollars, to be recovered in an action in the name of the state."

Section 5899, supra:

"The governor shall be ex-officio chairman of such board, and preside at all meetings when present. In the absence of either the president or secretary, their places may be filled temporarily by other members of the board. Three members shall constitute a quorum for the transaction of business."

Section 5984, supra:

"The tax list shall be completed and delivered to the county treasurer on or before the first day of November annually, and before its delivery the county clerk shall attach a warrant under the seal of the county, which warrant shall be signed by the clerk and shall in general terms command the treasurer to collect the taxes therein mentioned according to law; but no informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes or sale, or other proceedings for the collection of taxes as provided for in this chapter. Whenever it shall be discovered that the warrant in this section provided for was not at the proper time attached to any tax list, for any preceding year or years, in the hands of the county treasurer, the county clerk shall forthwith attach such warrant which shall be in the same form, and shall have the same force and effect as if it had been attached to such tax list before the delivery thereof to the county treasurer."

Section 5996, supra:

"The county treasurers of the several counties of this state shall be ex-officio county collectors of all taxes levied within their respective counties. No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the treasurer's office and pay his taxes."

Section 6035, supra:

"The treasurers of the several counties shall pay into the state treasury all funds in their hands belonging thereto on or before the tenth day of each month, and at such other times as the state treasurer shall require, and the sums so paid in shall be the identical state warrants, if any received by the treasurer for payment of the taxes, or in coin or in treasury notes of the United States."

Section 6039, supra:

"The county treasurer shall report and pay over the amount of tax and special assessments due to towns, districts, cities, villages, corporations and persons, collected by him, when demanded by the proper authorities or persons."

Section 6042, supra:

"The bond of every county treasurer shall be held to be security for the payment by such treasurer to the state treasurer and the several cities, towns, villages and the proper authorities and persons, respectively, of all taxes and special assessments which may be collected or received by him on their behalf, by virtue of any law in force at the time of giving such bond, or that may be passed or take effect thereafter."

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Original Number 16.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927.

EX PARTE: IN THE MATTER OF THOMAS E. WILLIAMS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., PETITIONERS.

BRIEF OF PETITIONERS.

O. S. SPILLMAN, Attorney General of Nebraska,
GEORGE LEE BASYE, Assistant Attorney General,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Petitioners.

WEBSSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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BRIEF OF PETITIONERS.

O. S. SPILLMAN, Attorney General of Nebraska,
GEORGE LEE BASYE, Assistant Attorney General,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Petitioners.

I.

The jurisdiction of this court is invoked under United States Code, Title 28, Section 342, United States Code Title 28, Section 377, United States Code, Title 28, Section 380.

The following cases sustain the jurisdiction of this court:

Ex parte Metropolitan Water Company, 220 U. S. 539.

Ex parte United States, 242 U. S. 27.

Cumberland Telephone & Telegraph Company v. *Louisana Public Service Commission*, 260 U. S. 212.

Prendergast v. *New York Telephone Company*, 262 U. S. 43.

II.

The tax commissioner of Nebraska, a defendant, is a state officer. *Constitution of Nebraska*, Article IV., Sec. 28, which is as follows:

> "A Tax Commissioner shall be appointed by the Governor with the advice and consent of the Senate. He shall have jurisdiction over the administration of the revenue laws of the state, and together with the Governor, Secretary of State, State Auditor and State Treasurer shall have power to review and equalize assessments of property for taxation within the state. He shall have such other powers and perform such other duties as the Legislature may provide. His term of office and compensation shall be as provided by law."

The Tax Commissioner is not a formal party. It seems clear that the Tax Commissioner has the right to initiate suits for the enforcement of the tax laws of the state. He is a proper party.

III.

The plaintiff treated the tax commissioner as a proper party and asked affirmative relief against him (Prayer of Petition, par. 4; Petition herein, pp. 75-76). The plaintiff prayed for a temporary injunction (Petition herein, p. 75) against all defendants. There was no objection by the defendants to the joining of the Tax Commissioner as a defendant. The averments of the bill gave the court jurisdiction.

Hart v. *Keith Vaudeville Exchange*, 262 U. S. 271.

IV.

County treasurers are officers of the state within the meaning of United States Code, Title 28, Sec. 380.

Several cases are cited in the return to show that county officers are not state officers.

Travis County v. *Jourdan*, 91 Tex. 217, 42 S. W. 543, is cited in the return.

In that case the Supreme Court of Texas in considering a statute concerning "officers of the state government," said:

> "Counties are but political subdivisions of the state, and most of the officers of a county perform functions for the state, and are, in a certain sense, state officers (citing cases). But it does not follow that they are 'officers of the state government' within the meaning of the article just quoted."

In *Donahue* v. *County of Will et al.*, 100 Ill. 94, cited in the return, a county treasurer was held not to be a county officer. That case is cited in *State* v. *Olson*, 15 Neb. 247. The question there involved concerned the ousting of a county officer and *Donahue* v. *County of Will et al., supra*, was cited. The court had misgivings as to its soundness; the judge who wrote the opinion said of it:

> "I think upon a careful consideration of the whole subject, that it is safe to follow this precedent, though that the case is entirely free from doubt cannot be said."

Donahue v. *County of Will, et al.*, was also doubted in *Conroy* v. *Hallowell*, 94 Neb. 804.

It is well recognized that the terms "state officers" and "officers under a state" are used in two senses. In a

popular sense they mean those whose jurisdiction is co-extensive with the state. In a legal sense, which is more enlarged, they mean officers who receive their authority from the state and perform functions of the state.

22 R. C. L. p. 386, "Public Officers," Sec. 19.

Walker v. *Bus*, 135 Mo. 325, 33 L. R. A. 616.

Travis v. *Jourdan*, *supra*.

The cases cited in the return are all state cases based upon state constitutions and state statutes. They can throw little, if any, light on the meaning of the Federal statute now under consideration. The use of the expression, "officer of the United States" in the Federal Statutes sometimes has an enlarged meaning.

Steele v. *U. S.*, 267 U. S. 505.

The instant case involves the use of the expression "officer of such state" in a Federal statute in connection with the enforcement of an order of a state board. The expression "officer of any state" is contained in Section 3 of the Fourteenth Amendment to the Federal Constitution. It has been considered by the courts to have a broad meaning and to include county officers.

In *Worthy* v. *Barrett*, 63 N. C. 199, it was held that the office of sheriff was within the meaning of the Fourteenth Amendment.

In re William T. Tate, 63 N. C. 303, held that a county attorney was also within the provisions of the Fourteenth Amendment.

United States v. *Powell*, 27 Fed. Cases 605, No. 16079, was a prosecution for accepting the office of sheriff when disqualified under the Fourteenth Amendment and the statute enacted thereunder. It was held (Syl. par. 1):

"One who, as constable of a county in North Carolina, took an oath to support the Constitution of the United States, and afterwards engaged in the Rebellion, is disqualified by the fourteenth amendment, unless relieved in the manner provided, to hold any office, state or national, and is therefor indictable under Section 15 of the Act of May 31, 1870 (16 Stat. 140), for subsequently accepting the office of sheriff."

In considering the Reconstruction Acts the Attorney General of the United States, in advising the President, June 12, 1869, 12 Opinions of Attorney General 182 (Sec. 12, p. 204) said:

"All the executive or judicial officers of any State, who took an oath to support the Constitution of the United States, are subject to disqualification, and in these I include county officers, as to whom I made a reservation in the opinion heretofore given. After full consideration, I have arrived at the conclusion that they are subject to disqualification, if they were required to take, as a part of their official oath, the oath to support the Constitution of the United States."

In view of these authorities it is clear that the decision in *Connecting Gas Co.* v. *Imes, County Treasurer, et al.*, 11 Fed. 2d. 191, cited in the return, gives too narrow a construction to United States Code, Title 28, Section 380, now under consideration.

County treasurers perform the functions of state officers in collecting state taxes. Section 5996, Compiled Statutes of Nebraska for 1922, provides:

"The county treasurers of the several counties of this state shall be ex-officio county collectors of all taxes levied within their respective counties. No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the treasurer's office and pay his taxes."

They are required to give bond. Section 5055, Compiled Statutes of Nebraska for 1922 provides, in part, as follows:

> "The following named officers shall give bond with penalties of the following amounts, to-wit: * * * each county treasurer not less than ten thousand dollars and not less than the amount of money that may come into his hands, to be determined by the county board; * * *."

The bond given by the county treasurer is to protect state funds as well as other funds. Section 5057, Compiled Statutes of Nebraska for 1922 provides, in part:

> "Any officer or person who is intrusted with funds belonging to the state or any county thereof, which may come into his possession by any appropriation or otherwise, shall be responsible for the same upon his bond. * * *"

Section 6042, Compiled Statutes of Nebraska for 1922 provides as follows:

> "The bond of every county treasurer shall be held to be security for the payment by such treasurer to the state treasurer and the several cities, towns, villages and the proper authorities and persons, respectively, of all taxes and special assessments which may be collected or received by him on their behalf, by virtue of any law in force at the time of giving such bond, or that may be passed or take effect thereafter."

Section 6043, Compiled Statutes of Nebraska for 1922, is as follows:

> "Upon the failure of any county treasurer to make settlement with the auditor, the auditor shall sue the treasurer and his surety upon the bond of such treasurer, or sue the treasurer in such form as may

be necessary, and take all such proceedings, either upon such bond or otherwise, as may be necessary to protect the interest of the state."

The times of payment of funds held by county treasurers into the state treasury is provided in Section 6035, Compiled Statutes of Nebraska for 1922, which is as follows:

"The treasurers of the several counties shall pay into the state treasury all funds in their hands belonging thereto on or before the tenth day of each month, and at such other times as the state treasurer shall require, and the sums so paid in shall be the identical state warrants, if any received by the treasurer for payment of the taxes, or in coin or in treasury notes of the United States."

If the state funds are lost, the state, and not the county, is the loser.

Lancaster Co. et al. v. *State of Neb.*, 74 Neb. 211-215.

In that case it was held that state taxes in the hands of a county treasurer are the property of the state and if lost without fault of the county, the county is not liable to the state therefor.

Railroads are assessed as personal property. Section 5840, Compiled Statutes of Nebraska for 1922 is as follows:

"The board on the first Monday of May of each year shall proceed to ascertain all property of any railroad company owning, operating or controlling any railroad or railroad service in this state, which for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, roadbed, right-of-way and depot grounds, and all water and fuel stations, buildings and super-structures thereon, and all machinery, roll-

ing stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with franchises and all other property of such railroad company used or held for the purpose of operating its road, and appraise and assess the same as personal property as herein provided."

County treasurers are required to issue distress warrants in collecting personal taxes, including state taxes. Section 1010, Compiled Statutes of Nebraska for 1922 is as follows:

"The county treasurer is hereby required, during the month of December of each year after the personal taxes for the year have become delinquent, to notify by mail all persons of the amount of their delinquent personal tax, and that unless the same is paid by February first next following, distress warrant will be issued therefor. The treasurer shall, on and after the first day of February next after the personal taxes for the last preceding year have become delinquent, collect the same, together with interest and costs of collection, by distress and sale of personal property belonging to the person against whom levied in the manner provided by law for the levy and sale of personal property on execution. Distress warrants shall be issued against all persons having delinquent personal tax for each year, and each such warrant shall include all delinquent personal taxes of the person against whom issued, unless such person shall, on or before February 1st, file with the treasurer an affidavit that he is unable, by reason of poverty, to pay any such tax, in which case distress warrants shall not issue until ordered by the county board."

V.

Several cases are cited in the return where interlocutory injunctions have been issued in cases where the

officers affected did not exercise state-wide authority. To the list should be added these cases where such injunctions were denied, but jurisdiction was not questioned.

Silvey v. *Commissioners of Montgomery County, Ohio, et al.*, 273 Fed. 202.

Smith v. *Wilson*, 273 U. S. 388.

Petitioners pray that the rule be made absolute.

O. S. SPILLMAN, Attorney General,
GEORGE LEE BABYR, Assistant Attorney General,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Petitioners.

Original Number 16.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1927.

EX PARTE: IN THE MATTER OF THOMAS E. WILLIAMS, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., PETITIONERS.

SUPPLEMENTAL APPENDIX TO PETITION.

O. S. SPILLMAN, Attorney General of Nebraska,
GEORGE LEE BASYE, Assistant Attorney General,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Petitioners.

The petitioners add to their petition, as a supplemental appendix thereto the following, being a copy of the bond for the temporary order of injunction and certain sections of the Statutes of Nebraska in force in 1922, and which are still in force. The sections quoted are all from the 1922 Compiled Statutes of Nebraska.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEBRASKA
OMAHA DIVISION.

Chicago, Burlington & Quincy Railroad Company, Plaintiff, vs. William H. Smith, as Tax Commissioner of the State of Nebraska, et al., (names other defendants omitted).	628 Equity

---

BOND FOR TEMPORARY INJUNCTION ORDER.

KNOW ALL MEN BY THESE PRESENTS: That we, Chicago, Burlington & Quincy Railroad Company, as principal, and the United States Fidelity & Guaranty Company, as surety, are hereby held and firmly bound unto the defendants, and each of them, and the successors in office and each of them in the penal sum of $1000.00 for the payment of which, well and truly to be made, we hereby bind ourselves jointly and severally, firmly by these presents subject to the following conditions:

WHEREAS, in this action on the 21st day of November, 1923, there has been issued upon the application of the plaintiff the temporary injunction order of this court enjoining the defendants, and each of them, and all persons acting by, through or under them, or any of them, including deputies, agents and attorneys from in any manner demanding or collecting, or attempting to collect taxes by distress warrants, suits, or otherwise, from the plaintiff on any of its property in excess of 75 per cent thereof, except city and village tax.

NOW THEREFORE, if upon the final determination of said action it shall be found that said temporary injunction order was wrongfully or improperly issued, then the above bounded shall pay all costs and damages as may be incurred or suffered by any party on account thereof, and if it shall be determined that any portion of the amount which the defendants herein are by said order enjoined from collecting, was properly assessable against the defendant, it shall pay thereon an amount equal to all manner of taxes levied upon its like property at the rates for 1923 taxation with an amount equal to any interest and penalties assessable against delinquent taxes of like character, as may be determined by this court. Then this obligation to be null and void, otherwise to be and remain in full force and effect.

Dated this 21st day of November, 1923.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Principal,

BY BYRON CLARK,
Its Solicitor.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Surety.

[SEAL]

BY HENRY BUSH,
Its Attorney in Fact.

The above bond is hereby approved as to form and surety and filed this 21 day of November, 1923.

J. W. WOODROUGH,
District Judge.

Endorsed: Filed Nov. 21, 1923.
R. C. HOYT, *Clerk*.

Section 5996, Compiled Statutes of Nebraska for 1922, provides:

> "The county treasurers of the several counties of this state shall be ex-officio county collectors of all taxes levied within their respective counties. No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the treasurer's office and pay his taxes."

Section 5055, Compiled Statutes of Nebraska for 1922, provides, in part, as follows:

> "The following named officers shall give bond with penalties of the following amounts, towit: * * * each county treasurer not less than ten thousand dollars and not less than the amount of money that may come into his hands, to be determined by the county board; * * *"

Section 5057, Compiled Statutes of Nebraska for 1922, provides in part:

> "Any officer or person who is intrusted with funds belonging to the state or any county thereof, which may come into his possession by any appropriation or otherwise, shall be responsible for the same upon his bond. * * *"

Section 6042, Compiled Statutes of Nebraska for 1922, provides as follows:

> "The bond of every county treasurer shall be held to be security for the payment by such treasurer to the state treasurer and the several cities, towns, villages and the proper authorities and persons, respectively, of all taxes and special assessments which may be collected or received by him on their behalf, by virtue of any law in force at the time of giving such bond, or that may be passed or take effect thereafter."

Section 6043, Compiled Statutes of Nebraska for 1922, is as follows:

"Upon the failure of any county treasurer to make settlement with the auditor, the auditor shall sue the treasurer and his surety upon the bond of such treasurer, or sue the treasurer in such form as may be necessary, and take all such proceedings, either upon such bond or otherwise, as may be necessary to protect the interest of the state."

Section 6035, Compiled Statutes of Nebraska for 1922, is as follows:

"The treasurers of the several counties shall pay into the state treasury all funds in their hands belonging thereto on or before the tenth day of each month, and at such other times as the state treasurer shall require, and the sums so paid in shall be the identical state warrants, if any, received by the treasurer for payment of the taxes, or in coin or in treasury notes of the United States."

Section 5840, Compiled Statutes of Nebraska for 1922, is as follows:

"The board on the first Monday of May of each year shall proceed to ascertain all property of any railroad company owning, operating or controlling any railroad or railroad service in this state, which for the purpose of assessment and taxation, shall be held to include the main track, side track, spur tracks, warehouse tracks, roadbed, right-of-way and depot grounds, and all water and fuel stations, buildings and super-structures thereon, and all machinery, rolling-stock, telegraph lines and instruments connected therewith, all material on hand and supplies provided for operating and carrying on the business of such road, in whole or in part, together with franchises and all other property of such railroad company used or held for the purpose of operating its road, and

appraise and assess the same as personal property as herein provided."

Section 6010, Compiled Statutes of Nebraska for 1922, is as follows:

"The county treasurer is hereby required, during the month of December of each year after the personal taxes for the year have become delinquent, to notify by mail all persons of the amount of their delinquent personal tax, and that unless the same is paid by February first next following, distress warrants will be issued therefor. The treasurer shall, on and after the first day of February next after the personal taxes for the last preceding year have become delinquent, collect the same, together with interest and costs of collection, by distress and sale of personal property belonging to the person against whom levied in the manner provided by law for the levy and sale of personal property on execution. Distress warrants shall be issued against all persons having delinquent personal tax for each year, and each such warrant shall include all delinquent personal taxes of the person against whom issued, unless such person shall, on or before February 1st, file with the treasurer an affidavit that he is unable, by reason of poverty, to pay any such tax, in which case distress warrants shall not issue until ordered by the county board."

Respectfully submitted,

O. S. SPILLMAN, Attorney General of Nebraska,
GEORGE LEE BASYE, Assistant Attorney General,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES.

No. 16, Original.—October Term, 1927.

Ex parte Thomas E. Williams, Tax Commissioner of the State of Nebraska, et al. } Petition for a Writ of Mandamus.

[May 21, 1928.]

Mr. Justice Brandeis delivered the opinion of the Court.

This is a petition by Williams, the tax commissioner of Nebraska, and 71 county treasurers asking for a writ of mandamus to be directed to District Judge Woodrough of the federal court for that State. A rule to show cause issued, 276 U. S. —; and the return has been made. The petitioners are the defendants in a suit in equity commenced in that court by the Chicago, Burlington & Quincy Railroad Company. When the cause was ripe for final hearing, they moved the district judge to call to his assistance two other federal judges, as provided in § 266 of the Judicial Code, as amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013, and the Act of February 13, 1925, c. 229, 43 Stat. 936, 938. Judge Woodrough denied the motion and set the case for final hearing, stating that "the object and purpose of this action is to enjoin the collection of taxes against plaintiff's property by defendants county treasurers . . . and there is no injunction issued, allowed or prayed for to restrain the action of any officer of the state of Nebraska and that the defendants county treasurers are not officers of the state of Nebraska" within the meaning of § 266 as amended. The petitioners contend that they are entitled as of right to have the case heard before three judges. Mandamus is the appropriate remedy. *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 546.

Nebraska has provided for the assessment of railroad property by a State Board of Equalization. Compiled Statutes, 1922, §§ 5839, 5840. After the board completes its valuation, it is required

to return to the county clerk of every county in which the railroad has property, a statement showing the proportion of the railroad that lies within the county, its average valuation per mile, and the valuations that shall be placed to the credit of each of the governmental subdivisions of the county. The board is authorized to fix the rate of taxation for state purposes and it transmits to the county clerk a statement of the rate so established. The county treasurers are ex officio collectors of all taxes levied within their respective counties whether for state or for local purposes. §§ 5847-5850, 5904, 5905, 5996.

The Railroad seeks in its suit to enjoin the collection of the taxes for 1923 on the ground that the equality clause of the Fourteenth Amendment was violated in making the assessment. It alleged that its property was assessed by the state board at 122% of its actual value, while the property of other taxpayers was assessed locally at not more than 60% of its value; that this discrimination was systematic and intentional; that the valuation of its property fixed by the state board had been certified to the clerks of the various counties and entered on the tax lists; that the taxes were about to become delinquent; and that the Company was without adequate remedy at law. It prayed that the court fix the percentage of the tax levied which it should pay to the county treasurers in tentative settlement, for a temporary restraining order, and for interlocutory and final injunctions. Pursuant to an order of the district judge, the motion for an interlocutory injunction came on for hearing, in November, 1923, before a court of three judges constituted as provided in § 266 of the Judicial Code. Because certain of the legal questions presented were deemed similar to those involved in *Chicago, Burlington & Quincy R. R. Co.* v. *Osborne,* 265 U. S. 14, then pending in this Court, the interlocutory injunction was granted.

The *Osborne* case was decided on April 28, 1924. On June 23, 1925, the district court, again composed of three judges, appointed, on motion of the Railroad, a special master to take evidence. His report was filed on January 31, 1928. Soon thereafter, the defendants made the motion that the District Judge call two additional judges to his assistance on final hearing. He was not required to do this unless the suit was one in which, as provided in § 266, it is sought to restrain "the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such

State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State . . upon the ground of the unconstitutionality of such statute." We are of opinion that Judge Woodrough properly denied the motion.

A case does not fall within § 266 unless a statute or an order of an administrative board or commission is challenged as contrary to the Federal Constitution. *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290; *Ex parte Buder*, 271 U. S. 461, 465. Here, there was no question as to the validity of the taxing statute. It was the assessment which the Railroad challenged. And an assessment is not an order made by an administrative board or commission, within the meaning of that section. The function of an assessing board is not that of issuing orders. Its function is informational. Its duty is to make findings of fact, and thereby furnish the basis on which other officials are to act in individual instances in levying and collecting the taxes. An assessment does not command the taxpayer to do, or to refrain from doing any thing; does not grant or withhold any privilege, authority, or license; does not extend or abridge any power or facility; does not determine any right or obligation. Compare *Standard Scale Co.* v. *Farrell*, 249 U. S. 571, 577; *Pennsylvania R. R. Co.* v. *United States Railroad Labor Board*, 261 U. S. 72; *United States* v. *Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299, 310; *Southern Bell Telephone & Telegraph Co.* v. *Railroad Commission*, 280 Fed. 901. An assessment is directed by one officer of the State to another. Compare *Great Northern Ry. Co.* v. *United States*, decided May 14, 1928. Though in Nebraska the railroad property is, in the main, assessed by a state board and the value of the part within each county is then determined on a pro rata basis, the function of assessing property within a county remains the same as it would be if the valuation of all the property were made by a county board. Whatever the scope of the jurisdiction of the assessing body and whatever the method of valuation pursued, the function to be performed remains simply that of fact-finding.

For the purpose of jurisdiction in federal courts, the difference between the function of regulating, expressed in orders of a railroad or like commission, and the function of fact-finding is vital. Determinations of an administrative board which are merely

findings of fact are not reviewable, *Keller* v. *Potomac Electric Co.*, 261 U. S. 428. Assessments become reviewable judicially only when they are translated into action, as by levy of the tax based on the assessment. From this difference between regulatory orders of administrative boards or commissions, which constitute action, compare *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226, and assessments by tax commissions or local assessors, which form merely a basis for action, flows the difference in the method of review in cases brought here under § 237 of the Judicial Code. A judgment of a state court sustaining the validity of a regulatory order of a public utilities board is reviewable by writ of error, like a judgment sustaining the validity of a statute. *Bluefield Waterworks & Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 683; *Northern Pacific Ry. Co.* v. *Department of Public Works*, 268 U. S. 39, 42; *Live Oak Water Users Association* v. *Railroad Commission*, 269 U. S. 354, 356; *Sultan Ry. & Timber Co.* v. *Department of Labor & Industries*, No. 274, decided May 14, 1928. But a judgment of a state court sustaining a tax alleged to be illegal because there has been discrimination in assessing property, can be reviewed only on certiorari. *Jett Bros. Distilling Co.* v. *City of Carrollton*, 252 U. S. 1, 5. This is true whether it was the determination of a state or local assessing body, or, as in the case at bar, of both combined, which is alleged to have produced the discrimination. *Baker* v. *Druesedow*, 263 U. S. 137.

Obviously an assessment which is not "a statute of or an authority exercised under any State" within the meaning of § 237, before amended by the Act of 1925, cannot be a statute or an order of an administrative board or commission under § 266. The orders contemplated by § 266 are directed to railroads or others, of whom action, or non-action, is commanded, as it is by a statute. Compare *Sultan Ry. & Timber Co.* v. *Department of Labor and Industries*, No. 274, decided May 14, 1928. Since an assessment by a state board of equalization has none of the qualities that would be associated with "orders", it cannot have been the sort of state administrative function which Congress had in mind when by the amendment of 1913, it declared the scope of § 266 so as to include suits in which the injunction was sought on the ground of the unconstitutionality of an administrative order.[1]

[1]The purpose of the amendment, as stated by Mr. Clayton, who had charge of the bill in the House, was "to put the order of a State railroad commission

Under the Act of February 13, 1925, the final hearing is not required to be before three judges unless the application for an interlocutory injunction was required to be. In a large majority of the cases of this character in which applications for an interlocutory injunction have been made, they have been heard before a single judge; and the propriety of the practice has not been questioned by this Court.[2] As we hold that the action of the state and county boards which is alleged to be discriminatory,

upon an equality with a statute of a State; in other words, to give the same force and effect to the order of a State railroad commission as is accorded under existing law to a State statute." 49 Cong. Rec. 4773.

[2]This appears to have been the uniform practice where the assessment was made by local officials. Union Pacific R. R. Co. v. Board of Commissioners of Weld County, 217 Fed. 540, 247 U. S. 282; Keokuk Bridge Co. v. Salm, 258 U. S. 122 (see original papers); Wilson v. Illinois Southern Ry. Co., 263 U. S. 574 (see original papers); Callaway v. Bohler, 291 Fed. 243, 248; see 267 U. S. 479, 483; Atchison, Topeka & Santa Fe Ry. Co. v. Board of Commissioners of Douglas County, 225 Fed. 978; Gammill Lumber Co. v. Board of Supervisors of Rankin County, 274 Fed. 630. It has also been the practice in the great majority of cases where the object of the suit was to enjoin local officials from levying a tax based on an assessment made by a state board and claimed to be discriminatory. Mudge v. McDougal, 222 Fed. 562; Nevada-California Power Co. v. Hamilton, 235 Fed. 317; City Ry. Co. v. Beard, 283 Fed. 313; Chicago & Northwestern Ry. Co. v. Eveland, 285 Fed. 425, 437 (in this case the Tax Commission was joined as defendant, but no relief appears to have been sought against it); Ohio Fuel Supply Co. v. Paxton, 1 F. (2d) 662, 663; Fordson Coal Co. v. Maggard, 2 F. (2d) 708; Connecting Gas Co. v. Imes, 11 F. (2d) 191, 195. On the other hand, in Chicago, Burlington & Quincy R. R. Co. v. Osborne, 265 U. S. 14, the hearing below was before three judges. In that case, as in this, the Tax Commissioner was joined as a defendant, but apparently no relief could have been given against him. Where relief by injunction has been sought against state tax commissions, boards of equalization, and their members, the practice has been less uniform. The application for a temporary injunction was entertained by a single judge in Johnson v. Wells Fargo & Co., 205 Fed. 60, 239 U. S. 234 (prior to the Act of 1913); Louisville & Nashville R. R. Co. v. Greene, 244 U. S. 522 (see original papers); Illinois Central R. R. Co. v. Greene, 244 U. S. 555 (see original papers); Louisville & Nashville R. R. Co. v. Bosworth, 209 Fed. 380; Standard Oil Co. v. Howe, 257 Fed. 481; United Verde Extension Mining Co. v. Howe, 8 F. (2d) 209. In Chicago, Milwaukee & St. Paul Ry. Co. v. Kendall, 278 Fed. 298, 266 U. S. 94, the hearing was before three judges. See also Illinois Central R. R. Co. v. Mississippi Railroad Commission, 229 Fed. 248; Chicago, Indianapolis & Louisville Ry. Co. v. Lewis, 12 F. (2d) 802; Cumberland Pipe Line Co. v. Lewis, 17 F. (2d) 167; Western Union Telegraph Co. v. Tax Commission of Ohio, 21 F. (2d) 355.

is not an order within the meaning of § 266, we have no occasion to consider whether the lower court was right in holding that the "county treasurers are not officers of the State of Nebraska," or whether there are other reasons why the suit is not within the scope of that section.

Rule discharged.

A true copy.

Test:

Clerk, Supreme Court, U. S.